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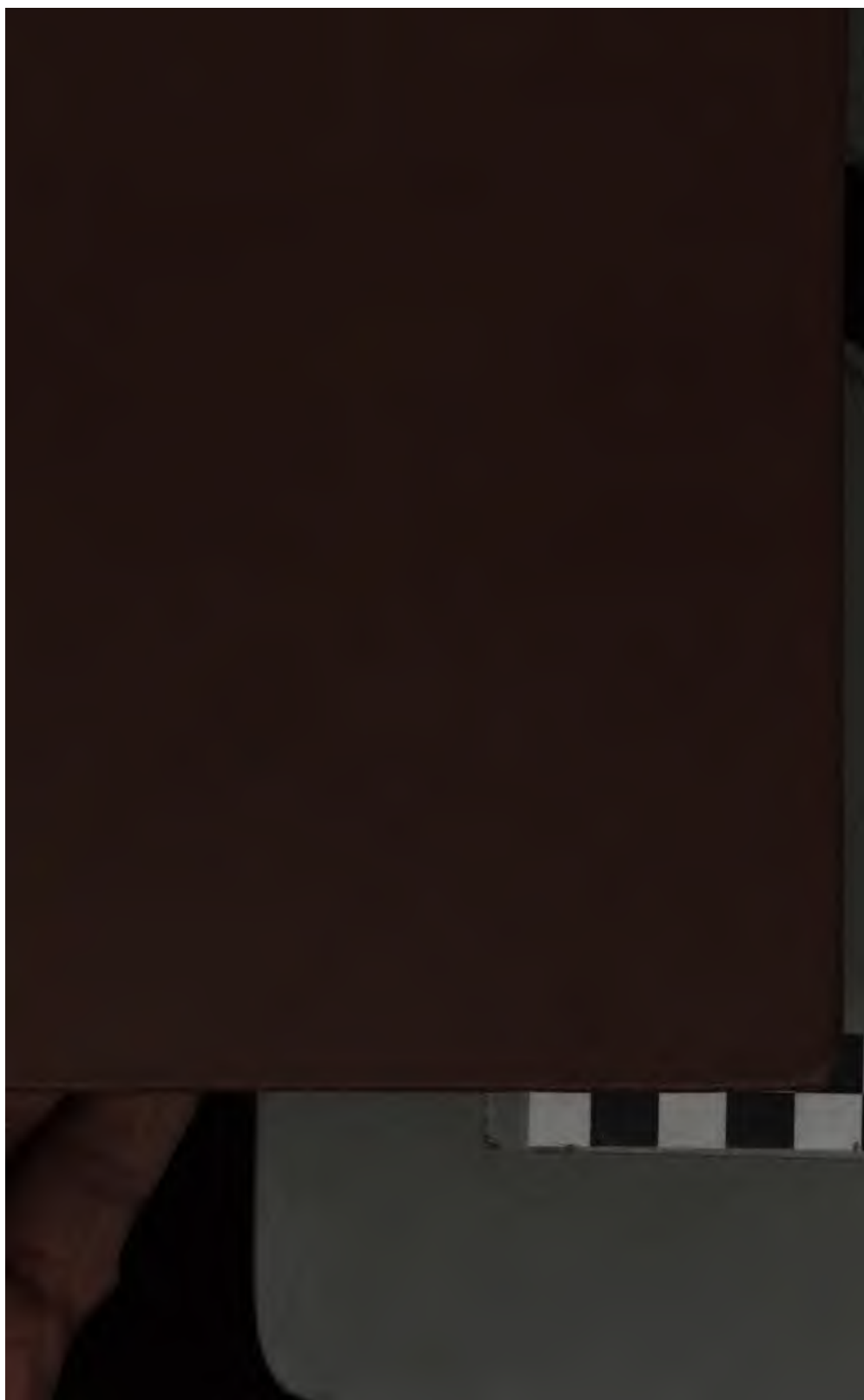
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STATE TRIALS;

OR,

A COLLECTION

OF

THE MOST INTERESTING TRIALS,

PRIOR TO THE REVOLUTION OF 1688,

REVIEWED AND ILLUSTRATED,

BY

SAMUEL MARCH PHILLIPPS, Esq.

OF THE INNER TEMPLE.

IN TWO VOLUMES.

VOL. II.

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THE TRIAL
OF
LORD RUSSELL,
AT THE OLD BAILEY,
FOR HIGH TREASON,

35 Charles II. 1683. — 9 *Howell*, 578.

THE Popish Plot had scarcely passed off the stage, when another came forward, called the Protestant or Rye-house Plot. The first intelligence of this conspiracy was obtained from the information of Josiah Keeling, on the P. 366. 12th of June, 1683. The disclosure which this man made to the Secretary of State, Sir Leoline Jenkins, involved him, together with Goodenough (the late Under Sheriff of London), West (a lawyer), Rumbold, and several other persons, in a project to assassinate the King and Duke of York, as they passed in their way from Newmarket, near Rumbold's house, called the Rye, in Hertfordshire. No warrant was issued upon this examination of

Keeling ; and, it is probable, that the Secretary of State required some corroboration of his statement, before he would take such a decisive measure. For the purpose of obtaining the requisite information, Keeling, accompanied by his brother, repaired to Goodenough on the 14th, and by putting questions to him, as to the number of men which could be raised, and the quantity of arms and ammunition to be procured, drew him unguardedly into a treasonable conversation. With this confirmation of the original intelligence, the two brothers immediately returned to the Secretary of State, and made a joint information, charging Goodenough with high treason. They met Goodenough again on the following day, the 15th of June ; and inquired of him, what persons of quality would be concerned :
P. 369. to which he is reported to have answered, that Lord Russell would be engaged in it to his utmost, and use all his interest to accomplish the design of killing the King and the Duke ;
P. 570. and that Colonel Rumsey was to advance 1000*l.* towards the same design.

A report of the conspiracy, and of its discovery, having soon spread through the town, fresh informations flowed in, and a proclamation was issued for the apprehension

of Rumsey and West. They surrendered themselves to the government, and gave information against their associates. Walcot, Hone, Rouse, and others, were immediately committed for trial. These men were charged with being engaged in a plot to assassinate the King. The Earl of Essex, also, Lord Russell, Algernon Sydney, and Hampden, who had been mentioned in some of the informations, as concerned with Shaftsbury, their leader, in a design to excite a rising of the people, were apprehended and committed to the Tower. [NOTE A.]

Walcot was first brought to trial, afterwards Hone; and both were condemned. "Their condemnation," observes Hume, "was probably intended as a preparative to the trial of Lord Russell." And it appears from the report of Walcot's trial, that a gross attempt was made by the counsel for the crown to prepossess the public mind against Lord Russell, not only P. 522. by insinuations thrown out against him and his friends, but also by introducing a mass of hearsay evidence, in which his name was involved, and which was wholly irrelevant and foreign to the case then under consideration.

Lord Russell, the eldest son of the Earl of

Bedford, was tried for high treason, on the 13th day of July, 1683. The trial was before Sir Francis Pemberton (Lord Chief Justice of the Court of Common Pleas), the Lord Chief Baron Montague, and the Judges, Windham, Jones, Charlton, Levinz, Street, and Withens.*

P. 579. The indictment charged Lord Russell with compassing and imagining the death of the King; and the overt act of this treason, laid in the indictment, was the consulting and agreeing with traitors to stir up insurrection and rebellion against the King, and to seize and destroy the guards, who were appointed for the preservation of the King's person.

Lord Russell, after pleading to the indictment, requested that his trial might be postponed for a single day, to give some of his witnesses, who were not expected to arrive before night, an opportunity of attending on his behalf. This application was refused by the Court, on the ground, that they had no power to put off the trial, without

* Only these eight Judges are mentioned in the report as present. Shower, in his short memorandum of this case, states, that there were eleven Judges present. 2 Show. 310, 311.

the consent of the counsel for the crown. The Chief Justice Pemberton, who presided, P. 582. here suggested to the Attorney General, Sir Robert Sawyer, the propriety of delaying the trial, till the afternoon, and proceeding in the mean time against some other prisoners.

L. C. J. "That my Lord may not be surprised, what think you of giving my Lord time till the afternoon, and try some of the rest in the mean time?"

Att. Gen. "Truly, my Lord, if I could imagine it were possible for my Lord to have any witnesses, I should not be against it."

Lord Russell. "It is very hard."

Att. Gen. "Do not say so. The King does not deal hardly with you. But I am afraid, it will appear, you would have dealt more hardly with the King. You would not have given the King an hour's notice for saving his life." — Lord Russell forbore to notice this attack ; and the business proceeded.

Lord Russell applied to the Court for a copy of the Jury-panel ; but on inquiry it appeared, that a copy had been delivered to some of his attendants for his use, which Lord Russell had mistaken for some other paper. He applied also for a copy of the indictment, on which

he was about to be tried, but this was refused.* Lord Russell again requested, that the trial might be put off till the afternoon. "I have a witness," said Lord Russell, "who is not in town. My counsel told me, it was never, or very seldom done, to arraign and try at the same time, except in cases of common malefactors."

L. C. J. "Mr. Attorney, why may not this trial be respited, till the afternoon?"

Att. Gen. "Pray call the Jury."

L. C. J. "My Lord, the King's counsel think it not reasonable to put off the trial any longer; and we cannot put it off without their consent."

The Attorney General having thus, without noticing the suggestion of the Lord Chief Justice, peremptorily ordered the Officer of the Court to proceed, and an immediate trial being resolved on, Lord Russell re-

* In answer to this application, for a copy of the indictment, the Chief Justice is reported to have said, that nothing could be granted, until Lord Russell had pleaded. The application does not appear, from the report, to have been repeated, after pleading. But it may be collected, from what the Court said in the next case, of Algernon Sydney, that a copy of the indictment was peremptorily refused. The right to have a copy of the indictment on trials for high treason, was first given by Stat. 7 W. 3. c. 3.

quested, that some person might be allowed to write for him, in order to assist his memory.

Lord Russell. "May I have somebody to write, to assist my memory?" — addressing himself to the Court.

Att. Gen. "Yes, a servant."

L. C. J. "Any of your servants shall assist you in writing any thing you please for you."

Lord Russell. "My wife is here, my Lord; to do it." [NOTE B.]

Before the trial commenced, a question *P. 585.* arose respecting the qualification of a jurymen, who was not a freeholder. Lord Russell asked one of the persons, called to serve on the jury, whether he had a freehold of forty shillings per annum in the city of London? But the Lord Chief Justice held, that such an exception could not be taken in the city of London, on account of the difficulty of finding a sufficient number of freeholders for the panel. Lord Russell, upon this, cited a statute of the reign of Henry V., and desired that his counsel might be allowed to argue the point. This was allowed, and three counsel, Pollexfen, Holt, and Ward, were assigned by the Court.

They argued, that, by the common law, a *P. 586.* freehold was a necessary qualification for a

juryman; and that, by the statute of 2 Henry V. st. 2. c. 3., no one can be admitted to pass upon any inquest, on the trial of the death of a man, (that is, in all cases, said they, where a man is arraigned for his life,) nor in any inquest betwixt party and party in plea real, nor in plea personal, where the debt or damages declared amount to forty marks, except he hold lands and tenements of the yearly value of forty shillings above all reprises. By this statute, they contended, that not only the qualification of a freehold is recognized, but its precise amount is fixed. They insisted also, that this statute applied to trials for treason in cities, no less than in counties at large; that such appears to have been the construction put upon it by Sir Edward Coke, who, in his first Institute (P. 157.), noticing this statute, speaks of the rule, which requires jurymen to be freeholders, as an universal rule, and makes no distinction between jurymen for counties at large, and jurymen for such counties as are also cities; and further, they argued, that the several statutes, which, in certain specified cases, take away the exception for defect of freehold on trials in London, (such as stat. 7 Hen. VII. c. 5., stat. 4 Hen. VIII. c. 3., and 23 Hen. VIII. c. 13.) afford strong grounds for

inferring, that by the common law, as well in London, as also in any county at large, only freeholders were qualified to serve on juries.

The counsel for the crown denied, that it was necessary at common law for jurymen to be freeholders ; and even if the statute of Henry V. should be considered to extend to capital cases generally, yet, since the statute of Phil. and Mary had made treason triable as at common law, it would no longer be requisite to have only freeholders ; and that, by the custom of London, others besides freeholders might sit as jurymen.

The Judges delivered their opinions upon this point, in order. The Chief Justice held, that, at common law, in cases of treason or felony, there was no power of objecting to a juryman on account of the want of freehold, and that this cause of challenge was introduced for the first time by the statute of Henry V. ; and although perhaps that statute might be thought to extend indiscriminately to treasons and felonies, yet, as the later statute of 1 and 2 Phil. & Mary, c. 10. s. 7., had required all trials for treason to be as they were at common law, this new regulation of the statute of Henry would be thenceforth virtually repealed, and the cause of challenge

P. 591.

could no longer be allowed. The Lord Chief Baron, and the other Judges, delivered their opinions nearly to the same effect. Levinz, Justice, said, he thought, that he was not driven to the necessity of determining, whether the want of freehold was a good cause of challenge at the common law, on a trial for treason, in counties at large; for, by the custom of London, which was part of the common law, it was not a good cause of challenge at least in the city; and even supposing that this custom had been in any degree affected by the statute of Henry V., still it would be revived by the statute of Philip and Mary, which restored the ancient mode of trial according to the common law. The question, put to the juryman, was thus overruled. [NOTE C.]

P. 596.

The counsel for the crown then proceeded to open the case, and call their witnesses. The first witness was Colonel Rumsey. His evidence is so very remarkable, and open to so much observation, it will not be possible to do justice to the case, without giving at length many parts of the statement in the form of question and answer. He began by saying, that he had been sent by Lord Shaftsbury about the latter end of the preceding October or the beginning of November, (which was

about eight months before the trial,) to the house of Sheppard, with a message for certain persons, who were met there, namely, the Duke of Monmouth, Lord Russell, Lord Grey, Sir Thos. Armstrong, and Ferguson: and that Lord Shaftsbury desired him to speak to them, to know what resolution they were come to about the rising of Taunton. He accordingly went to the house, and was conducted by Sheppard into an upper room, where they were assembled. He informed them, that Lord Shaftsbury had sent him to them, for the purpose of knowing what resolution they had taken as to the rising at Taunton. The answer, there given to him, was, that Mr. Trenchard had failed them, and that no more would be done in the matter at that time; that he had promised a thousand foot and three hundred horse, but that, when he came to perform it, he could not; and that he thought the people would not meddle, unless they had some time to make provision for their families.

L. C. J. From whom had you this message? P. 597.

Rumsey. Ferguson did speak most of it.

L. C. J. Who sent this message back?

Rumsey. Ferguson made the answer. Lord

Russell and the Duke Monmouth were present, and I think Lord Grey did say something to the same purpose.

Att. Gen. Pray, how often were you with them at that house?

Rumsey. I do not know, I was there more than once. I was there either another time, or else I heard Ferguson make a report to Lord Shaftsbury of another meeting.

Here Sergeant Jefferies interposed a question. "Was Lord Russell in the room *when this debate was?*"

Rumsey. Yes, my Lord.

Att. Gen. What did they say further?

Rumsey. That was all at that time, that I remember.

Att. Gen. Was there nothing, concerning Lord Shaftsbury to be contented?

Rumsey. Yes, that Lord Shaftsbury must be contented; and upon that, he took his resolution to be gone.

L. C. J. Did you hear any such resolution from him?

Rumsey. Yes, my Lord.

Att. Gen. Was there any discourse, while you were there, about a declaration?

Rumsey. I am not certain, whether I did hear something about a declaration there, or

that Ferguson did report it to Lord Shaftsbury, that they had debated it.*

Sergt. Jeff. To what purpose was the declaration?

L. C. J. We must do the prisoner that right. He says, he cannot tell, whether he had it from him or Ferguson.

Att. Gen. Did you hear no discourse to what it tended?

Rumsey. There was some discourse, about seeing what posture the guards were in.

Juryman. By whom was the discourse?

Rumsey. By all the company that was there.

L. C. J. What was that discourse?

Rumsey. To see what posture they were in; that they might know how to surprise them.

* This answer was very much in the style of a witness, who, though conscious that no such thing had occurred, yet artfully wished to raise some doubt with the jury, and leave it as a matter of even chance, whether something of the kind might not have occurred, though not distinctly sworn. That the witness had himself no doubt upon the question, is rendered nearly certain by something, which he threw in, rather incautiously, during the examination of the next witness; when he interposed a remark, "*that the declaration was not read, nor shown, in his presence, but this had been done before he came.*"

L. C. J. Whose were the words? Tell the words, as near as you can.

Rumsey. My Lord, the discourse was that some should ——

L. C. J. Who made that discourse?

Rumsey. My Lord, I think Sir Thomas Armstrong began it, and Ferguson.

The Lord Chief Justice had twice asked for the very words, but to no purpose. A leading question is then resorted to.

“Was it discoursed among all the company?” asked the Attorney General.

“All the company did debate it,” echoed back the witness. “And afterwards,” he continued, “they thought it necessary to see, with what care and vigilance they did guard themselves at the Savoy and Mews, whether they might be surprised or not.”

Att. Gen. Were there any, who undertook to go and see there?

Rumsey. I think, the Duke of Monmouth, Lord Grey, and Sir Thomas Armstrong.

Sergt. Jeff. Was Lord Russell there, when they undertook to take the view?

Rumsey. Yes.

Att. Gen. To what purpose was the view?

Rumsey. To surprise them, if the rising had gone on.

Sergt. Jeff. Did you observe by the debates that happened, that they did take notice, there was a rising intended?

Rumsey. Yes.

Sergt. Jeff. And that direction was given, to take a view of the guards, if the rising had gone on?

Rumsey. Yes.

L. C. J. Pray, Sir, declare justly the discourse.

Rumsey. I went to them from my Lord P. 598. Shaftsbury. And I did tell them that my Lord did pray, they would come to some resolution; and they told me Trenchard, on whom they depended for Taunton, had failed them, who, when he came up to town first at the term, had assured them, that in three or four hours' time he would have a thousand foot and three hundred horse; but that now, when it came to be tried, he answered, it was not possible for him to undertake it; for people would not rush into it of a sudden, but have some time to prepare for their families.

Att. Gen. Was it pretended there should be a rising at that time?

Rumsey. Yes, the 19th of November was appointed for the rising.

L. C. J. Was it before that time, you went to press them from Lord Shaftsbury?

Rumsey. Yes, I think it was, a matter of a fortnight before, or something more.

Att. Gen. But you say, besides what you heard there, you understood there was to be a rising at that time ; were you to be engaged in this ?

Rumsey. Yes, I was.

Att. Gen. In what capacity, as colonel or captain ?

Rumsey. There was no determination of that ; no quality.

L. C. J. By whose appointment was that ?

Rumsey. Lord Shaftsbury spoke that to me.

Sergt. Jeff. But pray, Colonel Rumsey, this you are very able to know, what the debates were, and need not be pumped with so many questions. Pray, was there any debate, when you came with the message from Lord Shaftsbury ; was there a debate about the rising ?

Rumsey. There was no debate, because they made answer, Mr. Trenchard had failed them.

Sergt. Jeff. But did they not take notice of rising ? Give an account of it.

Rumsey. I have done it twice.

Jury. We desire to know the message from Lord Shaftsbury.

Rumsey. I was sent by my Lord to know

the resolution of the rising in Taunton. They answered, that Mr. Trenchard, on whom they had depended for the men, had failed them, and that it must fall at that time, and my Lord must be contented.

Att. Gen. Was the prisoner present at that debate?

Rumsey. Yes.

Sergt. Jeff. Did you find him averse to it, or agreeing to it?

Rumsey. Agreeing to it.

Here the examination in chief closed; and Lord Russell was asked, whether he wished to propose any question to the witness. He desired to know, whether he had given any answer to any message about the rising.

L. C. J. Did you observe that my Lord Russell said any thing there, and what?

Rumsey. Yes, my Lord Russell did speak.

L. C. J. About what?

Rumsey. About the rising at Taunton.

L. C. J. What did my Lord Russell say?

Rumsey. He did discourse of the rising.

The second witness was Sheppard. He P. 600. spoke of two meetings at his house in the evening. Ferguson desired the use of his house for himself and some other persons of

quality, to meet there. The witness had notice, that the Duke of Monmouth, Lord Grey, Lord Russell, Sir Thomas Armstrong, Rumsey and Ferguson, would meet: and these persons did accordingly meet at his house, arriving one after another, nearly at the same time. The witness was certain, that Lord Russell was at one of the meetings; and believed that he was at both, but would not be positive, the meetings having been eight or nine months before the trial. Sir Thomas Armstrong desired, that none of the servants should go into the room, and that they might be private. "The substance of their discourse," said Sheppard, "was, how to surprise the King's guards; and, in order to do that, the Duke of Monmouth, Lord Grey, and Sir Thomas Armstrong, as I remember, went one night to the Mews, or thereabouts, to see the King's guards: and, the next time that they came to my house, Sir Thomas Armstrong said, 'the guards were very remiss in their places, and not like soldiers, and the thing was practicable, if they had strength to do it:' and that Lord Russell was present, when the discourse about seizing the guards took place."

The witness stated, further, that he did not

hear any discourse about a rising. He was asked, whether he remembered any writings or papers read at that time? "None that I saw," answered the witness. "Or that you heard of?" "Yes," replied the witness, "now I recollect myself, I do remember one paper was read." A paper, he said, somewhat in the nature of a declaration, was read by Ferguson, and shown to Sir Thomas Armstrong; shown, as the witness supposed, for approbation. He could not remember, whether all were present at that time; the Duke, he thought, was present, and Colonel Rumsey. (Here Rumsey interposed, saying, he was not present when the declaration was read.) The witness could not say that Lord Russell was present. The design of the paper, added the witness, was in the nature of a declaration, setting forth the grievances of the nation, in order to a rising, as he supposed by the purport of the paper; but he could not remember the particular words.* This was the substance of Sheppard's evidence.

* The account given by the witness, respecting the written declaration, appears not to have been admissible in evidence. For, first, it was not proved that Lord Russell was present when the declaration was read, or at which of the two meetings it was read: and, without

P. 602.

The next witness was Lord Howard of Escrick. He introduced himself by protesting, with what confusion he appeared before the Court. He then ran into a vague and desultory narrative, in which he made many general statements respecting ferments in the city, and unhappy divisions in the country. But soon he lowered his tone, and seemed much affected: "An unlucky accident had happened," he said, "that had sunk his voice;"—alluding to the death of Lord Essex, the report of which had only that instant arrived in court. [NOTE D.]

Not long detained by this burst of feeling, the witness set off again with a long and rambling hearsay-account of consultations and meetings, which he had received from Walcot. He then gave an account of what Lord Shaftsbury had said to him at a private interview, in which that nobleman complained of Lord Russell for having deserted him, and

such antecedent proof, it seems very questionable, whether any evidence of the declaration ought to have been received. But, secondly, even if the declaration was admissible, there was not competent evidence of its contents; for the witness professed only to state what he supposed to be its general design, without any distinct recollection of any part, or of any word.

boasted of his ten thousand brisk boys, who were all ready at the holding up of his finger, and in twenty-four hours would be multiplied into five times that number, then sally out, possess the gates of the enemy, beat the guards, and take Whitehall by storm. The witness told Lord Shaftsbury, this was a fair thing, but might be fatal, if not deeply laid, and well considered. Lord Shaftsbury replied, that he was sure to succeed, but was disappointed by the failure of the Duke of Monmouth and Lord Russell. The witness desired to consult them, before he disclosed his own intentions. Accordingly he went to the Duke of Monmouth, and told him what Lord Shaftsbury had said. The Duke of Monmouth answered, that he thought Lord Shaftsbury mad : that so far from giving him any encouragement, he had told him from the beginning, and so had Lord Russell, that nothing could be done in the country at that time. The witness reported this to Lord Shaftsbury : “ It is false,” said he, “ they did encourage me, but now they are afraid to own it.”

The witness then gave an account, which P. 607. he had received from Walcot, respecting Lord Shaftsbury's movements, and which was to this effect : — That Walcot informed him,

that Lord Shaftsbury had withdrawn, adding, that in about eight or ten days there would be a rising; that the witness informed the Duke of Monmouth of this, and, as he believed, the Duke informed Lord Russell. "We believed," said the witness, "his phrenzy was now grown to such a height, that he would rise immediately; so we endeavoured to prevent it. Upon which, Lord Russell, (I was told,) and the Duke of Monmouth, did force their way to Lord Shaftsbury, and persuaded him to put off the day of his rendezvous. I had not this from Lord Russell; for I had not spoken a word to him; but the Duke told me, that Lord Russell had been with him, (I had indeed an intimation that he had been with him,) and the Duke said, that he himself had not been with Lord Shaftsbury, but that Lord Russell was with him, having been conveyed by Colonel Rumsey."*

"After this day was put off," continued the

* This statement of the witness, which, if believed, would at once connect Lord Russell with Lord Shaftsbury, and with his "10,000 brisk boys," was undoubtedly false. Not a word of it is to be found in the witness's examination before the privy-council. (See 9 Howell, p. 434.) And if there had been any truth in the statement, it would, doubtless, have been proved by Rumsey.

witness, "it seems it was put off with this condition, that these Lords, and divers others, should be in readiness to raise the country about that day fortnight or thereabouts : for there was not above a fortnight's time given : and, says the Duke of Monmouth, we have put it off, but now we must be in action, for there is no holding it off any longer. And, says he, I have been at Wapping all night, and I never saw a company of bolder and brisker fellows in my life ; and, says he, I have been round the Tower, and seen the avenues of it ; and I do not think it will be hard, in a little time, to possess ourselves of it ; but, says he, they are in the wrong way : yet we are engaged to be ready for them in a fortnight, and therefore, says he, now we must apply ourselves to it as well as we can. And thereupon I believe they did send into the country ; and the Duke of Monmouth told me, he spoke to Mr. Trenchard, who was to take particular care of Somersetshire, with this circumstance ; says he, I thought Mr. Trenchard had been a brisker fellow ; for when I told him of it, he looked so pale, I thought he would have swooned, when I brought him to the brink of action, and said, I pray go and do what you can among your acquaintances ; and truly, I

thought he would have come then to action; but I went the next day to him, and he said it was impossible; they could not get the gentlemen of the country to stir yet."

P. 608.

Lord Russell. My Lord, I think I have very hard measure; here is a great deal of evidence by hearsay.

L. C. J. This is nothing against you; I declare it to the jury.

Att. Gen. "If you please, my Lord," (addressing himself to the witness,) "go on, in the method of time. This is nothing against you," (turning to the prisoner,) "but it is coming to you, if your Lordship will have patience, I assure you."

The witness was then permitted to continue, at great length, the hearsay reports which he had received from Walcot, on the subject of several designs for a rising, which had not been carried into effect. He spoke of another intended rising, fixed for the 17th of November, but spoke of it only from report.

It was next determined, said the witness, (which was the last alarm and news I had of it,) to be done upon the 17th of November. He remembered the day, from a particular reason, which he mentioned. This design

also was disappointed; and Lord Shaftsbury, being told that things were not ripe in the country, took shipping and got away.

After this mass of hearsay, — which was calculated to excite the most fatal and unjust prejudices against Lord Russell, and which was utterly inadmissible, — followed some of the most important evidence in the case: “Now, Sir,” said the witness, “after this we all began to lie under the same sense and apprehensions that my Lord Shaftsbury did, and we had gone so far, and communicated it to so many, that it was unsafe to make a retreat: and this being considered, it was also considered, that so great an affair as that was, consisting of such infinite particulars, to be managed with so much firmness, and to have so many parts, it would be necessary, that there should be some general council, which should take upon them the care of the whole. Upon these thoughts we resolved to erect a little cabal among ourselves, which did consist of six persons; and these persons were, the Duke of Monmouth, my Lord Essex, my Lord Russell, Mr. Hampden, jun., Algernon Sydney, and myself.

Their first meeting, said the witness, was P. 609. about the middle of January, preceding the trial, at the house of Hampden. At that

meeting they agreed, that their peculiar province was to superintend certain arrangements of a general nature, which could not be so well conducted by individuals. The points, which principally challenged their care, were these: First, Whether the insurrection would be most properly begun in London, or in the country, or in both at the same time? Upon this point, the Duke of Monmouth advised, that it should not be in the city. Another point, which they debated, was, what counties and towns were most disposed to action? A third point was, what arms were necessary, and how they might be disposed of? A fourth point was, as to the necessity of having a common bank, of about 25 or 30,000*l.* to answer the occasions of such an undertaking. The last, and greatest of all matters under consideration, was, how Scotland could be drawn in to concur; for they thought it necessary, that a diversion should be made. Nothing was done, (said the witness,) but these things were offered for their consideration, and they were to contribute their joint advice. About ten days afterwards, the same party had another meeting at Lord Russell's; when they came to a resolution to dispatch some persons to Scotland, for the

P. 610.

purpose of making an arrangement with Lord Argyle, and to invite into England some who were perfectly well acquainted with the state of Scotland. They accordingly directed a person to be sent, Aaron Smith. Algernon Sydney was intrusted with the care of this business; and the witness was afterwards informed by him, that he had sent Smith. The party agreed not to meet again till the return of the messenger, believing that the meeting, which had taken place, might have occasioned some observation.

Att. Gen. You are sure my Lord Russell P. 611. was there?

Lord H. Yes, Sir: I wish I could say, he was not.

Att. Gen. Did he sit there as a cypher? What did my Lord say?

Lord H. Every one knows, my Lord Russell is a person of great judgment, and not very lavish in discourse.

Sergt. Jeff. But he did consent?

Lord H. We did not put it to the vote; but it went without contradiction, and I took it that all there gave their consent.

The last witness, West, was then called. P. 615. The first question put to him by the Attorney General was, whether, by his manage-

ment of the plot, he understood that any, and which, of the Lords were concerned? The witness, in answer, said, that he never had any conversation with Lord Russell; but that, in the insurrection in November, he heard from Ferguson and Rumsey, that Lord Russell intended to go down and take his post in the west, when Trenchard had failed there.

L. C. J. What is this?

Att. Gen. We have proved my Lord privy to the consults; now we go about to prove, that the under-actors did know it.

Here again the witness, without a question, began — “ They always said, my Lord Russell was the man they most depended upon, because he was a person looked upon as of great sobriety.”

Lord Russell. Can I hinder people from making use of my name? To hear this brought to influence the gentlemen of the jury, and inflame them against me, is hard.

The Lord Chief Justice ruled, that the account was mere hearsay, and not evidence. The Attorney General waived it, as unnecessary: and Sergeant Jefferies said, that they would not use any thing of garniture.—Here the case closed on the part of the prosecution.

The Chief Justice, after recapitulating the

principal points of the evidence, and mentioning particularly the written declaration as a part of the evidence which pressed, asked Lord Russell, whether he had any answer to give to the case proved against him.

Lord Russell had before solemnly denied hav- Defence.
ing been at Sheppard's house more than once, and affirmed, that there was not on that occasion any discourse, in his hearing, on the subject of surprising the guards, and no undertaking to raise a military force. He now complained, more in the tone of concern than of anger, that, on such an occasion, when he was charged with the highest of all crimes, the counsel for the Crown had unjustly heightened and aggravated every topic against him, and endeavoured to excite a prejudice by intermixing an account of the practices and speeches of other persons, with whom he had no connection. That they had taken such unfair advantage against one, who was a stranger to proceedings of this nature, unskilled in law, an unready speaker, without counsel, and alone. He was sensible, he said, how unqualified he was to make his just defence, but he trusted that the judges would be impartial, and that the jury would value innocent blood; remembering always, that

with the same measure they meted to him, it should be measured to them again, either in this or in another world. He conjured them to consider well, how little credit was due to witnesses, who, in swearing against him, swore to save their own lives.*

He insisted also, in point of law, that a design to raise an insurrection, or to levy war, was not treason by the statute of Edw. III., or by any other statute before the 13th of Car. II. ; and if he was prosecuted on the latter statute, the time for commencing the prosecution, which was limited to six months, had elapsed. The Attorney General answered, that he proceeded on the statute of Edw. III. ; and that it had been determined by several resolutions, that to prepare forces to fight against the King, is a design to kill the King, within the meaning of that statute ; and a design to depose the King, or to imprison the King, or to raise the people against the King, has been settled to be within that statute, and *evidence of a design to kill the King.*

* The reader is referred to the speech, lately given to the public by Lord John Russell, from a manuscript in Lord Russell's handwriting. (See the History of Lord William Russell by Lord John Russell, p. 198.)

Lord Russell then insisted, that there had not been two witnesses to each overt act; but to this the Chief Justice truly answered, that the two witnesses required by the statute, are not witnesses to the same individual act, but to the same species of treason; and if there are several acts declaring the same treason, and one witness to each of them, they have been reckoned two witnesses, within the statute of Edw. III. "Your Lordship remembers," said the Attorney General, addressing himself to Lord Russell, "that in Lord Stafford's case, there was but one witness to one act in England, and another witness to another act in France." And Sergeant Jefferies added, "There was not so much evidence against him, as there is against your Lordship."

Three witnesses were called, on behalf of P. 619. Lord Russell, to contradict the evidence of Lord Howard. Lord Anglesey said, he had met Lord Howard at the house of the Earl of Bedford, who was in great affliction on account of his son Lord Russell. Lord Howard, on that occasion, congratulated the Earl on his having so wise and excellent a son; one who could never be concerned in such a plot, or even suspected of it; and declared, that he knew nothing against him, or against any other

person, of such a barbarous design. He assured the Earl, that he might be comforted, and that he had every reason to expect a favourable issue.

Mr. Howard, the second witness, said, that Lord Howard (who was his relation and friend, and who had been concealed in his house, on the breaking out of the plot,) assured him, upon his honour and faith, and, as strongly as if he had taken an oath before a magistrate, that he knew nothing of any man concerned in the business, and particularly observed, that he knew nothing of Lord Russell.

Doctor Burnet, the third witness, stated, that he saw Lord Howard the night after the breaking out of the plot, and then he assured him, in the most solemn manner, as he had often done before, that he knew nothing of any plot, nor believed any; and treated the thing with contempt.

P. 625. Lord Howard was here called upon by the jury to give some explanation of the language which he had used in the presence of Lord Anglesey. "The jury," said the foreman, "desire to ask my Lord Howard something upon the point my Lord Anglesey testified, and to know what answer he makes to

my Lord Anglesey." The witness then made another long speech, eulogizing Lord Russell, apologizing for himself, and protesting that he could hardly be provoked even to make his own defence, lest it might prejudice his friend, whom he was so anxious to serve, and for whom he had such affection, that it was with extreme unwillingness he bore the part, which he was then acting, and that nothing but his sense of duty to God, to the King, and his country, would have induced him to come forward. He admitted, that he had used the words which Lord Anglesey reported, pleading in excuse, that he was obliged to outface the thing in his own defence, as well as for his party, and that he meant nothing more than to acquit Lord Russell of all design against the person of the King.

Many witnesses came forward to give their P. 622-4. testimony to Lord Russell's loyalty. Of these, the most distinguished were, Lord Cavendish, Dr. Tillotson, Dr. Burnet, Dr. Cox, the Duke of Somerset, and Dr. Fitzwilliams. Some of them had been intimately acquainted with Lord Russell, and from their habit of confidential intercourse, had the fullest opportunities of being well acquainted with his opinions and feelings on political subjects. They declared, that

he was most decidedly adverse to any rising of the people, and always spoke of it as a measure of extreme folly and madness. They all concurred in paying that tribute to his distinguished virtues, which the voice of the country confirmed, and history has since recorded. The manner, in which they discharged this last act of friendship and justice, is not the least affecting part of this interesting trial. One of the witnesses with much emphasis declared, that he had always considered Lord Russell to be one of the best sons, one of the best fathers, one of the best masters, one of the best husbands, one of the best friends, and one of the best christians.*

P. 625.

The evidence on the part of the defence, being now closed, Lord Russell made his last address. He began by declaring, that he had a heart sincerely loyal and affectionate to the King, as well as to the government, which he esteemed the best government in the world. That as to an attack upon the King's person, he thought it an act so barbarous, so detestable, so abominably wicked, rash, and inconsi-

* *Civis, maritus, gener, amicus, cunctis vitæ officiis æquabilis, opum contemptor, recti perricax, constans adversus metus.* Tac. Hist. lib. 4. c. 7.

derate, as none but desperate wretches or madmen could contrive. He considered any attempt to excite rebellion as not less desperate than wicked. He was always disposed to preserve the government on its due basis and ancient foundation, and never could be induced to seek redress for grievances, except in a parliamentary and legal course. He was an enemy to every kind of innovation and irregularity, and should continue such to the hour of his death, be it sooner or later. "And now," said Lord Russell in conclusion, "I am in your hands, my honour, my life, and all. I trust, that the heats and animosities, which are abroad, will not incline you to find an innocent man guilty. I call heaven and earth to witness, that I never had, nor ever shall have, a design against the King's life. I am in your hands. God direct you."

The Solicitor General Finch, and Sergeant P. 625. Jefferies, replied. The former made an able and not unfair speech, doing justice to Lord Russell's honour and blameless character in private life, but attributing his designs to a love of popularity, and to the ambition of being cried up as the patron of liberty. The latter betrayed an illiberal and intemperate zeal on the part of the prosecution; grossly mistating

and exaggerating many parts of the evidence; sneering at some of Lord Russell's connections; and holding his character cheap. "Two parts," said he, "were to be acted in this horrid tragedy: there was the first part, in which the scoundrel sort of people were to be concerned, to take away the lives of the King and of the Duke; the great persons were to head the party in the rising. They put themselves in proper postures, each of them consenting to something of the surprise." He laid great stress upon the death of Essex, as a proof of the guilt of treason. "Who should think, that my Lord of Essex, who had been advanced so much in estate and honour, should be guilty of such desperate things! which had he not been conscious of, he would scarcely have brought himself to that untimely end, to avoid the methods of public justice."

P. 635.

The Chief Justice summed up the case in a short speech, excusing himself from the task of repeating the particulars of the evidence, in consequence of the full statement made by the counsel for the crown. It was, however, much to be regretted, that, instead of taking so cursory a view, he did not adopt the safer and more satisfactory course, of

selecting from the mass of evidence at least the more material parts, and laying them before the jury in the plain language of the witnesses. Such a recital would have been the best corrective of the numerous misrepresentations, unfair statements, and the overcharged colouring of the King's counsel. It was to be lamented also, that in the short summing up of the Lord Chief Justice, several erroneous statements appear to have been made in some important parts of the evidence; and these of a nature, likely to produce very considerable effect upon the jury. [NOTE E.]

The manner, in which the Chief Justice stated the principal question for the consideration of the jury, as to the nature of the overt acts, was remarkable for its fairness, and deserves to be noticed. "The question before you, will be," he said, "whether, upon the whole matter, you believe that my Lord Russell had any design upon the King's life, to destroy the King, or take away his life; for that is the material part here. It is used and given you by the King's counsel, as evidence of this design, that he did conspire to raise an insurrection, to cause a rising of the people, and to surprise the King's guards; which, they say, can have no other end, but to seize

and destroy the King. *And if Lord Russell did design to seize the King's guards, and make an insurrection in the kingdom, it is great evidence of a design to surprise the King's person.* It must be left to you, upon the whole matter: You have not evidence in this case, as there was in the other matter that was tried yesterday, against the conspirators, to kill the King at the Rye. In that case there was a direct evidence of a consult to kill the King, which is not given you in this case. This is an act of contriving rebellion and an insurrection within the kingdom, and to seize his guards, which is urged as evidence, and surely it is in itself an evidence, to seize and destroy the King. Upon the whole matter, this is left to you. If you believe the prisoner at the bar to have conspired the death of the King, and, in order to that, to have had these consults, which the witnesses speak of, then you must find him guilty of this treason, that is laid to his charge."

The event of the trial is well known. The jury, after a short deliberation, returned a verdict of guilty.

P. 666.

On the following day, the 14th of July, Lord Russell was again brought to the bar, to receive the judgment of the Court. He then submitted, that judgment ought not to pass upon him, be-

cause the witnesses had spoken only of a conspiracy, to raise a rebellion, and not of any intention to kill the King. The Recorder, Sir George Treby, said, in answer, "This was an exception proper, (and, as I think, you made it,) before the verdict. Whether the evidence did amount to prove the charge; that was proper to be observed to the jury; for if the evidence come short of the indictment, they cannot find it to be a true charge; but when the jury have found it, their verdict passes for truth." The judgment of death was then pronounced. [NOTE F.]

At the conclusion of this trial, a few considerations may be suggested, with respect to the law, and the several facts of the case. Some writers have considered the trial of Lord Russell, for the conspiracy charged in the indictment, to be a violation of the law of treason. As the levying of war is made by the statute of Edw. III. a distinct and substantive act of treason, this, they say, is a strong ground for inferring, that the mere conspiring to levy war was not intended to be made a treasonable act; and if a conspiring to levy war, or raise an insurrection, or to surprise and seize the King's guards, can be deemed

Examination of evidence.

sufficient to warrant a conviction of treason, they insist, that the crime of high treason will become the most undefined of all offences, and thus the first object of the statute would be entirely defeated. This is the course of argument much pressed by Sir Robert Atkins and Sir John Hawles, who shortly after the trial wrote in vindication of Lord Russell's innocence.* The same reasoning has been adopted by writers of a later period. Hume, in his History†, though not inclined by political bias to favour Lord Russell, lays it down, as a clear proposition, that the form of the indictment and trial artificially confounded two species of treason, which the statute had accurately distinguished. And Mr. Fox, no inconsiderable authority even on a question of this kind, expresses in strong terms the same sentiment.‡

In support of the contrary opinion, many precedents might be shown, to warrant, as far as precedent can warrant, the mode of laying the charge in this indictment. But without going into any lengthened discussion

* See 9 Howell, p. 719. 794. † Vol. viii. p. 192.

‡ History of James II. The passage alluded to, is given at length by Howell, p. 518.

or citing decisions, (the authority of which might with as much reason be questioned, as the precedent in Lord Russell's case,) it may be worth considering shortly, whether in sound reasoning, and on the plain interpretation of the statute of treasons, the indictment and proceedings in this case can be justly deemed to contravene the provisions of that statute. Lord Russell, it is always to be remembered, was not charged with conspiring to raise rebellion, as a specific or substantive treason : such a conspiracy was not made a substantive act of treason by the statute of Edward III. The specific treason, with which he was charged, was the compassing and imagining the death of the King ; and the conspiracy to raise rebellion was charged only as the overt act, or means employed, by which he manifested that design, and did an act towards carrying that design into execution. The question, therefore, seems to be simply this, whether the conspiracy, charged in the indictment, was of such a nature, as to have a manifest tendency to produce the death and destruction of the King ; for if it had that tendency, then, in as much as every man, endued with reason, must be supposed to contemplate and intend the natural and probable consequences

of his own act, it follows, that the proof of such conspiracy would be evidence of a design to kill and destroy, or, in other words, evidence of the treason charged in the indictment.

The strongest of all proofs, to evidence a design of killing, would manifestly be the proof of *an actual attempt* to kill. And it will not be disputed, that the conspiring to kill is equally strong evidence of the same design, and therefore a plain overt act of compassing and imagining the death of the King. What, then, shall be said of a conspiracy to depose or imprison the King, or a conspiracy to levy war against the King? Is it an unreasonable conclusion, that the person, who designs the overthrow of the King, designs also his death? The proof of such conspiracies appears to be, strictly speaking, no less evidence of the one design than of the other. The same may be said of a conspiracy, entered into with foreigners, to procure an invasion of the kingdom. The same reasoning applies also with equal force to the last instance, which remains to be mentioned, namely, a conspiracy to raise insurrection and rebellion against the King, and a conspiracy to seize his guards, which are the overt acts in

the present case. It may be observed, of all these conspiracies, that they have a manifest tendency, more or less immediate and direct, to endanger the King's life. The seizing of the King's guards would lead to the seizing of the King's person, and this last step would probably lead to his death. They may, therefore, be properly laid as *overt acts* of the imagining and compassing of his death; and the proof of any one of these conspiracies is *competent evidence* of such traitorous design; in other words, it is evidence for the consideration of the jury, whose exclusive province it is, in this as in other cases, to determine, whether the accused had the design, imputed to him by the indictment.*

But the proof of any such overt act, though it be legitimate evidence of the traitorous intent, appears to be only evidence, competent indeed and cogent, not absolutely conclusive; affording a natural and reasonable presumption of fact, not a presumption or conclusion

* The act of parliament, for the reversal of Lord Russell's attainder, recites, as one of the grounds of reversal, *his wrongful conviction by partial and unjust constructions of law*. But it does not specify any particular instances of such constructions; nor is there, in this respect, any just cause of complaint.

of law. It is of great importance to bear in mind the difference between these two propositions. If the proof of a conspiracy, to raise an insurrection, were to be considered as amounting, by conclusion of law, to a full proof of the imagining of the death of the King, the jury would be constrained to convict of high treason, on bare proof of the fact of such conspiracy: whereas, if it is merely of the nature of evidence, and proposed only as evidence of such imagining, the jury, before they can legally convict, would have to determine, whether upon such evidence they are of opinion, that the prisoner did imagine and design the death of the King, — (bearing in mind always, that he must be considered as intending, whatever is the necessary or probable consequence of his own acts). This was the point of view, in which the Lord Chief Justice, and the King's counsel, considered the proofs in the present case. The summing up on this important point was distinct and clear; it seems also to have been most unexceptionably correct, and warranted by the highest authorities. [NOTE G.]

With regard to the state of facts proved against Lord Russell, it is a task of some difficulty to separate truth from falsehood,

and ascertain with precision the fair result of the evidence of the several witnesses. The evidence of Rumsey and Sheppard relates to three distinct heads : first, the answer given by the party to Lord Shaftsbury's message : secondly, the discourse respecting the surprising of the guards : and thirdly, the written declaration. These particulars occurred at the house of Sheppard, where, according to his evidence, there were two meetings. It is necessary to settle, in the first instance, at which of these meetings Lord Russell attended ; and then to determine, if possible, how much transpired in his presence and hearing. Lord Russell was undoubtedly at one of the meetings : this he admitted himself, but denied that he was at more than one. Sheppard could not state positively, that Lord Russell was at both meetings ; nor could Rumsey himself remember being at both. There was, therefore, no proof, that Lord Russell was at more than one of the meetings ; and as Lord Russell and Rumsey were certainly at the same meeting, and the meeting, at which Rumsey was present, must have been the last, (for he was at that meeting, at which the final answer was sent to Lord Shaftsbury,) it follows, that Lord Rus-

sel was proved to have been present only at the last of the two meetings.

This point being settled, the next question is, what took place at that meeting in the presence of Lord Russell? The answer to Lord Shaftsbury's message was undoubtedly given in his presence; this is clear from Rumsey's evidence. But the written declaration seems not to have been read at that time. Neither Sheppard nor Rumsey remembered the reading of that paper, while Lord Russell was present. As it appears to have been drawn up preparatory to an intended rising, it was not at all likely to have been read at the last meeting, when the intention to rise was wholly abandoned. And Rumsey, it may be remembered, in a remark, which he interposed during the examination of Sheppard, declared positively, that he was not present when the declaration was read. The written declaration, therefore, may be laid entirely out of the case. With regard to the other point namely, the surprisal of the guards, it appears from Sheppard's evidence, that at one meeting there was a discourse as to some plan for the surprising of the guards, and that at the *next* meeting (that is, the *last*), a report was made by Sir Thomas Armstrong as

to a view which had been taken, and respecting the actual position of the guards. What was said about this position of the guards, must have passed in Lord Russell's presence; but he does not appear to have been at the other meeting, when the discourse as to the plan for a surprisal is stated to have occurred.

If this examination of the evidence is just, it follows that a most material part of Rumsey's evidence was entirely false: I refer to that part, in which he stated, that *there was some discourse about seeing what posture the guards were in, that they might know how to surprise them; and that they afterwards resolved to take a view of the guards, and that Lord Russell was present at the time of this resolution.* This could not have occurred at the last meeting, because Sheppard's evidence shows, that it must have occurred, if at all, at the first. It could scarcely have occurred at the last, for another reason; because, whenever it occurred, it must have been preparatory to an intended rising, and for the purpose of carrying such design into effect, whereas at the last meeting the party abandoned altogether their intention to rise. And another circumstance, almost decisive of the falsehood of the evidence, here referred to, is, that Rumsey said

nothing to that effect in his examination before the privy council.

After rejecting, therefore, what was stated by Sheppard to have passed at the first meeting (at which Lord Russell was not present,) on the subject of taking a view of the guards, and rejecting also what he stated as to the written declaration,—the witness's evidence is reduced merely to this, that, at a meeting, in Lord Russell's presence, Sir Thomas Armstrong was heard to say, that the guards were very remiss in their places, and not like soldiers, and that a surprise was feasible, if there were sufficient strength to do it.

Separating from the evidence of Rumsey what he said respecting the guards (as being false), and what he said respecting the written declaration, (as having occurred at a former meeting,) we shall reduce his evidence to the statement of what passed at the time of his delivering the message from Lord Shaftsbury. Whether at that time there was any discourse or debate, by any of the party respecting a rising, as a thing intended to be carried into effect, — is an important matter for consideration. The main object of the counsel for the crown, in examining this witness, was to force him into an admission, that there had been something of a debate upon that sub-

ject. “*Did you observe,*” asked Sergeant Jefferies, “*by the debates that happened, that they did take notice, there was a rising intended?*” A more unfair question could not have been asked. It was evidently intended to lead the witness to give some opinion as to their designs, and this opinion was to be set up as proof of the fact of a design. The question was also equivocal, leaving it uncertain, whether the inquirer meant to ask respecting some future rising then intended, or as to some rising which might have been intended at some former period. To the question, so put, the witness answered in the simple affirmative; from which the jury would infer, that the party did at that time resolve on a rising. Yet it is clear from other parts of his evidence, that all design of rising was then abandoned; and that the account of a rising having been fixed for an appointed day, was received by the witness from Lord Shaftsbury, and not from any of the party at Sheppard’s. What places this point beyond all doubt, and ascertains to a certainty, that a rising was not resolved upon, nor debated at Sheppard’s in Lord Russell’s presence, is an answer by this witness to a question, which was very incautiously pressed upon him by

the King's counsel: "Pray, Colonel Rumsey," said Sergeant Jefferies, "this you are very able to know, what the debates were? and need not be pumped with so many questions: pray, was there any debate about a rising?" To this the witness answered distinctly: "*There was no debate of it; because they made answer, that Mr. Trenchard had failed them.*"* It is material to attend to this answer, because it shows, that another part of the witness's evidence, in which he stated, in answer to a question from Lord Russell after the close of the examination in chief, "*That he (Lord Russell) did discourse of the rising,*" must have been false. If there was not any debate or discourse respecting a rising, Lord Russell could not possibly discourse of it.

* This answer, it may be remarked, agrees with the evidence of the same witness in Algernon Sydney's case, (see 9 Howell, p. 847.) in which he said: "The latter end of October or beginning of November, I was desired by my Lord Shaftsbury to go to Mr. Sheppard's, to know of the gentlemen that were met there, what was done about the rising intended at Taunton; and I had their answer, that Mr. Trenchard had failed them, and that it must cease for that time. *That was all at that time.*" The answer agrees also with the examination of the witness, before the privy council, only about three weeks before the trial. (See 9 Howell, 380. 382.)

This assertion, moreover, (that Lord Russell discoursed of a rising,) is perfectly inconsistent with some other parts of the witness's statement. For although he repeated no less than four times, all he remembered as to the conversation, yet not once did he give the least reason to suppose that Lord Russell had uttered a word. At first, he said, in his examination in chief, "*Ferguson spoke much of the answer ;*" afterwards he varied his account, saying, "*Ferguson made the answer, Lord Russell and the Duke of Monmouth were present, and Lord Grey, as he thought, said something to the same purpose.*" Here Lord Russell is mentioned as being present only, not as speaking. But if it was true, that the witness believed Lord Russell to have spoken, as well as Lord Grey, it can scarcely be doubted, that he would have noticed such a striking circumstance ; nor is it to be imagined, that such important information, if it had been in the possession of the witness, would not have been communicated to the King's counsel, or, if it had been communicated, that they would have failed to draw it from the witness in the course of their examination, and so have given it its full effect. This statement of the witness is rendered still

more improbable and absolutely incredible, by the answer to another question in the examination in chief; when, on being asked, *What did they say further?* he answered, "*That was all at that time, as he remembered ;*" by which he plainly intimated his belief, that Ferguson and Lord Grey were the only speakers upon the subject, and that he could not remember Lord Russell saying any thing. The conclusion, therefore, is, that in the evidence of Rumsey there was not sufficient proof of a discourse or debate concerning a rising; and that the fact of such a debate was rather disproved by him than proved.

The ground being thus cleared, we shall reduce the evidence of Rumsey merely to the following statement : That, in consequence of something which had passed between him and Lord Shaftsbury, he went to Sheppard's house, where he found the Duke of Monmouth, Lord Russell, Lord Grey, Sir Thomas Armstrong and Ferguson; and there he informed them of the message from Lord Shaftsbury, and desired to know what resolution they had taken about the rising of Taunton; to which message the answer was, that Trenchard had failed them, and that no more would be done in the matter at that time: that Trenchard

had promised 1000 foot and 300 horse, but that when he came to perform it, he could not: that he thought the people would not meddle, unless they had some time to make provision for their families: that Ferguson spoke most of this: that Lord Russell and the Duke of Monmouth were present, and that Lord Grey, as the witness thought, said something to the same purpose.

The substance of Lord Howard's evidence, when separated from the great mass of hearsay, in which it was involved, tended to prove the following facts: That Lord Russell was one of a general council, consisting of six persons, who took upon themselves to consider the best means of raising an insurrection, what parts of the country were most disposed to rise, what funds would be necessary, and how Scotland might be induced to concur in the design. [NOTE H.]

Such being the summary (and, it is believed, a full and faithful summary,) of the evidence, when cleared of all irrelevant and questionable matter, the next consideration is, in what form and with what directions the case would have been properly submitted to the consideration of the jury. Rumsey's evidence, in its direct and primary import,

showed, that the party at Sheppard's, so far from resolving or conspiring *at that time* to raise an insurrection at Taunton, or at any other place, actually resolved to drop and abandon the rising. But upon this evidence, taken in its full extent, combined also with the evidence of Lord Howard, it appears to have been fairly a question for the jury to determine, whether Lord Russell and the rest of the party had not *before that time* entertained some design upon the subject of a rising, although it was afterwards abandoned; or, at least, whether they had not some previous knowledge of an intended rising, in which they concurred. If this was a fit question for the jury, (as, on the best consideration, it seems to have been, however weak and inconclusive the evidence may be thought by some,) the case against Lord Russell was not, as he insisted in his defence, a case of mere *misprision* of treason; since the offence of misprision of treason necessarily excludes all previous knowledge of the subject of debate.

Lord Russell took this ground of defence, insisting that the case at the utmost amounted only to *misprision* of treason: he adopted it, on the suggestion of Sir Robert Atkins, who wrote a letter of advice for the purpose of

assisting him. Sir Robert Atkins, after stating that he did not see any inconvenience or hazard in pleading the general plea of not guilty, (since, if it should turn out upon the proofs that the crime was only misprision of treason, and not the crime of treason itself, the jury must acquit,) proceeds to describe (in terms somewhat too general) the offence of misprision of treason. "Being present in company with others," he says, "where those others do consult and conspire to do some treasonable act, does not make a man guilty of treason, unless by some words and actions he signify his consent to it, and approbation of it : but his being privy to it, and not discovering it, makes him guilty of *misprision* of treason, which consists in the concealing it ; but it makes him not guilty of treason. And if the same person," he continues, "be present a second time, or oftener, this does not make him guilty of treason, but only raises a strong suspicion that he likes it, and consents to it, or else he would have forborne, after his having been once amongst them. But the strongest suspicion does not sufficiently prove a man guilty of treason, nor can it go for any evidence." The main ground of his argument is this, that there must be some overt act set

forth in the indictment ; and if the barely being present should be taken to be a sufficient overt act, then there is no difference between treason and misprision of treason.* This line of defence, for Lord Russell, has been frequently adopted by other writers.

The law on the subject of misprision of treason is laid down more distinctly and accurately by Mr. Justice Foster. “ In the case of *once* falling into the company of conspirators, if the party met them *accidentally or upon some indifferent occasion*, bare concealment, without *express assent*, will be only misprision of treason. But if a person be once present at a consultation for treasonable purposes, and conceal it, *having had a previous notice*, (that is, *knowledge*,) *of the design of the meeting*, this is evidence proper to be left to a jury of such assent, though the party say or do nothing at such consultation. And the law is the same, if he is present at more than one such consultation, and does not dissent or make a discovery.”† To apply this principle to the present case, (in which it seems impossible to maintain, that Lord Russell was at

* See Sir Robert Atkins's Tracts, p. 336.

† See Foster, Cr. L. 195.

the meeting at Sheppard's *accidentally or upon an indifferent occasion,*) the jury would be properly directed to consider, on a review of all the circumstances of that meeting, and taking into account also the meeting at his own house, and the other meeting at Hampden's, whether he had not a previous knowledge of the design of the meeting at Sheppard's, or whether he did not assent to the proceedings at that meeting.

With regard to the evidence of Sheppard, (who stated what Ferguson had reported at the meeting, as to the assailable position of the guards,) it can scarcely be deemed sufficient to warrant the least presumption or inference against Lord Russell; the report not having been in any manner acted upon, and being clearly connected with something that had passed at a former meeting, at which Lord Russell was not present, and the proceedings of which did not appear to have been made known to him.

The only other material witness was Lord Howard; and on his evidence the jury would be properly directed to consider, whether Lord Russell had not consulted with the other five persons, above named, as to the best means of effecting a rising in the country, or, in other words, whether he had not

entered into a conspiracy to raise an insurrection against the King and his government.

After clearing away all doubtful evidence, excluding all hearsay, and cutting off all the unsound parts of the case, the great question still occurs, whether there was not competent proof of the overt acts laid in the indictment, fit to be submitted to the jury for their determination? This question is one, upon which a difference of opinion cannot fail to exist; and on which even the most dispassionate and reflecting minds, as they are more or less forcibly impressed by the various parts of the evidence, may be allowed to vary in their conclusions. But we must not forget, that the very circumstance of an existing difference of opinion would of itself justify and demand the interposition of a jury. And on the most severe investigation of the case, with the most anxious desire to discover truth, an impartial judge (it is conceived) would feel himself constrained to come to the conclusion, that a case was proved against the prisoner, on which the jury would be properly required to exercise their judgment.

Admitting, however, this to be so, an impartial judge must agree also in thinking, that in the course of the trial great injustice was committed. Much bad evidence was re-

ceived, and persisted in, even after repeated objections. The written declaration ought not to have been admitted ; neither ought the conversations between Lord Howard and Walcot ; still less the conversations between Lord Howard and Lord Shaftsbury. This mass of hearsay was summed up to the jury by the Lord Chief Justice, as being an *inducement* to the account, which Lord Howard gave concerning the prisoner. An inducement, indeed, it was, which, if believed by the jury, (and they were not led to disbelieve it, or to question its truth,) would fully establish the existence of a treasonable plot, and could scarcely fail of leading to a conviction. The summing up contained also some erroneous statements, before noticed, which were likely to prove extremely prejudicial to Lord Russell, if not fatal. There is no great cause, perhaps, for complaining, that the Court omitted to make those observations, which we should now hear from the Bench, on the suspicious and tainted character of the evidence of accomplices ; because there was no precedent for such remarks in the old times, when accomplices were considered not only to be competent, but also the best and most credible of witnesses, even without confirmation.

In making these reflections on the summing

up of the Lord Chief Justice, there is no wish to detract from his merits. It was much to his honor, that he pressed the King's counsel to consent to the postponement of the trial, for the accommodation of Lord Russell. He laid down the law of treason, with reference to the overt acts charged in the indictment, in a manner the most fair and unexceptionable. And the best proof that he was not sufficiently pliant to suit the purposes of the Court, is to be found in his dismissal from the bench immediately after this trial, and the erasing of his name from the list of Privy Counsellors. Upon the whole, it seems just to conclude, that the trial of Lord Russell, defective as it undoubtedly was, and inconsistent with the practice and principles now happily established, was yet one of the least exceptionable of the State Trials of that period.

NOTES.

NOTE A. p. 3.

EVELYN, in his Journal, has given the following short notice of the subject of this trial :—“After the Popish Plot,” he writes, “there was now a new, and, as they called it, a Protestant Plot discovered ; that certain Lords and others should design the assassination of the King and the Duke, as they were to come from Newmarket, with a general rising of the nation, and especially of the city of London, disaffected to the present government ; on which were committed to the Tower the Lord Russell, eldest son of the Earl of Bedford, the Earl of Essex, Mr. Algernon Sydney, son to the old Earl of Leicester, Mr. Trenchard, Hampden, Lord Howard of Escrick, and others. A proclamation was issued against Lord Grey, the Duke of Monmouth, Sir Thomas Armstrong, and one Ferguson, who had escaped beyond sea.” Evelyn, vol. i. p. 554.

NOTE B. p. 7.

A late eloquent writer, in attempting to embellish this incident, has weakened its effect. “Le tribunal, qui jugeoit Lord Russell, lui demande, quelle personne il vouloit désigner pour lui servir de secrétaire pen-

dant son procès. Il choisit Lady Russell, "parce que, dit il, elle réunit les lumieres d'un homme à la tendre affection d'une épouse."* Infinitely more natural and affecting is the plain language of Lord Russell.

A letter, from Lady Russell, requesting to be allowed to attend at the trial, is still extant. It is in these words : "Your friends believing I can do you some service at your trial, I am extreme willing to try. My resolution will hold out : pray let yours. But it may be, the Court will not let me. However, do you let me try."† This short letter, so naturally expressed, is most pathetic, when we consider at what a moment it was written, and what an awful meaning is conveyed by those simple words. It exactly accords with all we know of the temper and feelings of the parties. We are not surprised to find, that Lady Russell, forgetting every personal feeling, had been urgent in her entreaties, to be allowed to assist at the side of her Lord ; or that Lord Russell was unwilling to expose her at such a time and in such a place, and perhaps distrusted his own resolution. He probably yielded to her entreaties, from a wish to leave with her the consoling remembrance, that she had stood by him faithfully to the last in his utmost need. Lord Russell's friends seem to have foreseen, that the appearance of Lady Russell, in such a situation, would produce a deep impression. And it had that effect ; for, after the Court had assented to the request, and Lord Russell said, "My wife is here, my Lord, to do

* *Mad. de Stael, Considérations sur les Princ. Even. de la Revolution Française*, tome iii. p. 315.

† See the Life of Lord Russell, by Lord John Russell, p. 34.

it," — at that moment, we are told, "the whole assembly felt a thrill, when they saw the daughter of the virtuous Southampton rising to assist her Lord in the hour of his distress."

NOTE C, p. 10.

All the judges, present at the trial, concurred in overruling Lord Russell's challenge of the juror. Levinz, on the ground of a special exception, by the usage and custom of the city of London; all the other judges, on the broader principle, that trials for treason were to be regulated by the course and order of the common law, and that the want of freehold was not at common law a good cause of challenge. The Chief Justice, when the objection was first started, overruled it on the other ground, adopted by Levinz; but, after argument, he abandoned this, and decided upon the general principle above stated. Neither the Court, nor the counsel for the prisoner, nor the Attorney or Solicitor-General, cited any authority or decision, to show what the rule of the common law was on the subject of challenges. But, in point of reasoning, the counsel for Lord Russell appear to have had the advantage; especially, in that part of their argument, in which they maintained, that if this cause of challenge were allowed by the common law, (which is the universal law of the land,) it could not be disallowed or affected by any city-custom; to which they might have added, that this alleged city-custom, in derogation of common right, was neither proved in fact, nor vouched by any legal authority, as an usage to be judicially noticed by courts of justice. It is an important question,

whether the judges decided right, in holding that the cause of challenge for defect of freehold did not exist by the common law; in other words, that freehold was not by the common law a necessary qualification of petty jurors.

On referring to the books of the highest authority on this subject, there is not, perhaps, to be found sufficient information to lead to absolute certainty. Sir Edward Coke and Sir Matthew Hale lay down the rule, that a freehold is necessary: but it is uncertain, whether they lay this down, with reference to the common law, or with reference to the statutes upon the subject. Sergeant Hawkins, who has stated the authorities very fully, leaves the question, after all, involved in some degree of difficulty. However, on a careful examination of the subject, there appears upon the whole, to be good reason for concluding, that by the common law a freehold of some value was a necessary qualification. This at least seems to be clear, that the qualification of freehold was not, as supposed by the judges in delivering their opinions, required, for the first time by the stat. of Hen. 5. For the earlier stat. of Westm. 2., 13 Edw. 1. c. 38., contains the following clause: "*Statutum est de cætero, quod non summoneantur in unâ assizâ plures quam viginti et quatuor; senes etiam, videlicet ultrâ sexaginta et decem annos, perpetuo languidi, vel tempore summotionis infirmi, vel in patriâ non commorantes, non ponantur in juratis vel minoribus assisis. Nec etiam ponantur in assisis aut juratis, licet in proprio comitatu capi debeant, aliqui qui minus habeant tene-mentum quam ad valentiam viginti solidorum per annum:*" which last clause has been most incorrectly

translated, in the earliest English versions of the statutes, as follows: "*that may dispend less than twenty skillings yearly.*" And the stat. 21 Edw. 1. st. 1, 2., (which raises the qualification much higher in point of value, in case of a trial out of the proper county,) contains the following clause, as to trials *within* the proper county: "*Ita tamen, quod infra comitatum, coram justiciariis assignatis vel aliis ministris domini regis ad juratas, inquisitiones, seu alias recognitiones capiendas, non ponatur aliquis, nisi habeat terras vel tenementa ad valentiam quadraginta solidorum per annum ad minus.*"

The stat. of West. 2d., which directed the returning officer, as to the persons who were to be summoned to serve on juries, was not intended to alter the *nature* of the qualification of jurors, but to raise its *amount*. The statute was made *for the ease of jurors of small estates only*; so it has been considered by the Lord Chief Baron Comyns.* It does not enact, generally, that freeholders shall serve on juries, but that those who have a tenement (that is, a frank tenement or freehold) *of less value* than twenty shillings annually, shall not be summoned; so that it did not create the qualification of freehold, but evidently recognized it as existing, and only modified it. And since freehold is the only species of qualification mentioned in this statute, and it cannot be supposed that the same relief, which was granted to the small freeholders, would not have been also extended to all other proprietors equally poor, if any other species of property, besides freehold, would qualify: it seems

* Com. Dig. tit. Challenge. C. (c. 2.)

to follow, that freehold was, antecedently to this stat. of West. 2d., a necessary and essential qualification for petty jurymen. Hence it follows also, that the stat. of Hen. 5. did not introduce any new regulation as to the *nature* of the qualification, but only as to its *amount*. This statute, like that before mentioned, seems to shew clearly, that, before that time, a freehold of *some* value was essential.* The fair reasoning, therefore, upon these statutes, seems upon the whole to be strongly in favour of the challenge.

Though the Lord Chief Justice Pemberton decided against the challenge, in this case, (on the general principle, that such a cause of challenge was not allowed at common law,) it is to be observed, that, against his opinion, there is an authority, equally high, which might be cited on the other side,—a contrary decision of the same learned judge, upon the same point, in a former trial. In the case of Fitzharris, who was tried in Middlesex for high treason, only two years before Lord Russell, the Chief Justice Pemberton held, and the other judges must have agreed with him in opinion, that those who were not freeholders of the county could not be sworn on the jury; and for this reason he rejected a person, called to the book, on his declaring himself not to be a freeholder.†

There is high legislative authority also for holding, that the rule, on the subject of challenges, was not correctly laid down in this trial. 1st. The act of Parliament, passed in the first year of Wm. & Mary,

* See Rolle. Abr. tit. Trial, p. 648. art. 36.

† See Fitzharris's case, 8 Howell, p. 335.

by which the attainder of Lord Russell was reversed, recites, as one ground for the reversal, the refusal of a lawful challenge for want of freehold.* 2d. The Declaration of Rights, 1 Wil. & Mary, ses. 2. c. 2., after reciting, that jurors, not being freeholders, had of late years been returned, and had served in trials for high treason, (contrary to the laws, statutes, and liberties of the realm,) declares, in the eleventh article, that jurors in trials for high treason ought to be freeholders. 3d. The stat. of 7 & 8 W. 3. c. 3. s. 10. (the act for the regulation of trials in cases of treason) recites, that by the good laws of the realm, in trials of commoners for their lives, a jury of twelve freeholders must all agree in one opinion, before they can acquit or convict.

One other reason may here be stated, to shew that the decision in this case was not correct. The judges, in Lord Russell's trial, reasoned thus: Although the stat. of Hen. 5., said they, should be taken to extend to cases of high treason, and to all capital cases, so as to make freehold a necessary qualification, (which they rather seemed to admit, and that point was conceded by the Attorney-General), yet since the stat. of Phil. & Mary (1 Phil. & Mary, c. 10. s. 7.) enacted, that all trials for treason should thenceforth be had only according to the due order and course of the common laws of the realm, and not otherwise; this, said they, restored the trial by common law, and put an end to the right of challenge under the stat. of Hen. 5.; so that the challenge, for want of freehold, (as they held,) which did not exist

* See 9 Howell, 696.

at common law, could not exist at all. Now, it was an error, (though very common in those times,) to suppose, that the statute of Phil. & Mary repealed the clause referred to in the statute of Hen. 5., or that it repealed the provision in the statute of Edw. 6., respecting the necessity of two witnesses on trials for treason; it was an erroneous opinion, to suppose that it had the effect of repealing any provision in any statute, made *in favour* of the subject. Mr. Justice Foster has clearly established this principle; and shewn by arguments most convincing, that the clause, referred to, in the statute of Phil. & Mary, was intended in *favour* of the subject, not to his *prejudice*, and that this was the sole intent of the clause.* Consequently, the power of challenging, which was a benefit and a right, was not touched by the statute of Phil. & Mary, but remained in the same state as before the passing of that act; and, in this view of the case, the question, as to the right of challenge *at common law*, could not properly be brought into discussion.

It seems to be now settled, that the right to challenge, in a case of treason, is the same in trials within cities which are counties in themselves, as in counties at large. The clause in the Declaration of Rights, above mentioned, and the statute of 4 & 5 Wil. & Mary, which is referred to below, appear to be decisive on this point; independently of all other arguments, not founded on these two statutes. In the case of Sir Richard Grahme (Lord Preston), who was tried at the Old Bailey in 1691; and in the case also of

* Fost. Cr. L. p. 237. *et seq.*

Francin, who was tried at the Old Bailey in 1717, the petit-jurors were sworn, on the *voire dire*, as to their freeholds ; and the defect of freehold was considered a good cause of challenge on both sides.*

Some alteration was made by a statute of Hen. 8. in the qualification of jurors, in case of trials *for murder or felony*, within cities and towns corporate; and this statute supplies a very strong argument, that, before the passing of the act, on trials for *treason* also, freehold was a necessary qualification. This statute (23 Hen. 8. c. 13.,) recites, that trials for *murder and felonies*, in cities, boroughs, and towns corporate, were often delayed by reason of challenges for insufficiency of freehold, and enacts, that every natural-born subject, having the privileges and liberties of a city, borough, or town corporate, in which he dwells, being worth in moveable goods and substance to the clear value of forty pounds, should be thenceforth admitted in trials of murders and felonies, in every sessions and gaol deliveries, for such city or town corporate, though he should have no freehold.

The qualifications of jurymen are defined clearly

* 12 Howell, 646., 15 Howell, 897. The reader will find many authorities and arguments on this subject, collected in a tract written by Sir Rob. Atkyns, entitled, "A Defence of Lord Russell's Innocence;" (see 9 Howell, 791.) in a tract by Sir John Hawles, entitled, "Remarks on Lord Russell's Trial," (see 9 Howell, 794.); and in the arguments and judgments in Dr. Sheridan's case, in 1811, in the Court of King's Bench in Ireland, where the principal question was, whether, in a *city*, freehold is an essential qualification of a *grand* juror, on a trial for a *misdeemeanor*. (See 31 Howell, p. 579—631.)

by the stat. 4 & 5 Wil. & Mary, c. 24., which enacts, in the fifteenth section, that "all jurors, (other than strangers, upon trials *per medietatem linguæ*,) who are to be returned for trials of issues joined in any of the courts of Westminster, or before justices of assize, or *nisi prius*, oyer and terminer, gaol delivery, or general quarter sessions of the peace, in *any county* in England, shall each of them have in their own names, or in trust for them, within the same county, ten pounds by the year at least above reprises, of *freehold or copyhold* lands or tenements, or of lands and tenements of ancient demesne, or in rents, or in all or any of the said lands, tenements, or rents, in fee-simple, fee-tail, or for life of themselves or some other person: and that in every county in Wales, every such juror shall have within the same county six pounds by the year at least in manner aforesaid above reprises. All which persons, having such estates as aforesaid, are enabled and made liable to be returned and serve as jurors for the trial of issues before the said courts and justices. And if any of a lesser estate and value shall be respectively returned upon any such jury, it shall be a good cause of challenge, and the party returned shall be discharged upon the said challenge, or upon his own oath of the truth of the said matter." Then follows the form of the writ of *venire facias*, to be directed for the impanelling of juries in the aforesaid causes, within *any county* of England. And the 17th section saves the ancient usage, in all cities, boroughs, and towns corporate, for returning jurors of such estate and in such manner, as had been before used and accustomed.

In the case of Townly, who was tried in the county of Surrey, in 1746, every juryman, as he came to the book, was asked, whether he was a freeholder or not. Those who answered, that they had no freehold in the county were examined, upon a *voire dire*, to that matter; and, on their answering that they had *no freehold*, were set aside. Those who answered, that they had both *freehold and copyhold*, were asked whether both put together did amount to 10*l.* a-year; and if they did, that was admitted to be a good qualification, though the freehold alone was under 10*l.* The Court grounded this rule on the Bill of Rights, (1 Wil. & Mary, st. 2. c. 2.) and the 4 & 5 Wil. & Mary compared.*

If the case, stated by Mr. Justice Foster, should again occur, of a juryman answering that he has both *freehold and copyhold*, but not freehold alone, amounting to 10*l.* a-year, a question might, perhaps, arise, whether it would be competent to the counsel for the prisoner to inquire (under the stat. of 2 Hen. 5. st. 2. c. 3., above-mentioned,) as to his freehold being *of the yearly value of forty shillings above all charges or reprises*. For the stat. of Hen. 5. enacted, that “no person shall be admitted to pass in any inquest *upon the trial of the death of a man*,” (which words are best construed to mean, *upon trials of life and death*, that is, in capital cases,) “nor in any inquest betwixt party and party in plea real, — nor in plea personal, whereof the debt or damages demanded amount to forty marks, — if such person have not lands or tenements” (which words must be understood to mean *frank tenement* or freehold)

* See Foster's Cr. L. p. 7.

“of the yearly value of forty shillings above all charges of the same, (*outré les reprises dicelles*): so that it be challenged by the party, that any person, so impanelled in such cases, hath not lands or tenements of the yearly value of forty shillings above all charges.” Now, it seems to have been clearly shewn in an argument of Mr. Justice Foster, before referred to, that the stat. of Hen. 5. must not be taken to have been repealed by the stat. of Phil. & Mary, which required all trials for treason to be according to the due course and order of the common law; (though that was laid down by the judges in Lord Russell’s case;) nor does it appear to have been repealed by any other statute. It certainly is not repealed by the stat. of 4 & 5 Wil. & Mary: and there is nothing in this latter statute, (construed as it has been in Deacon’s case, in conformity with the clause in the Bill of Rights upon the same subject,) inconsistent, or in any degree at variance, with the regulation in the stat. of Hen. 5. (as to a freehold of *forty shillings* clear yearly value). The argument is this: As the words in the stat. of 4 & 5 Wil. & Mary, (“every of the jurors shall have of *freehold or copyhold* lands ten pounds by the year,” are, by comparing them with the stat. 1 Wil. & Mary, st. 2. c. 2., and with stat. 7 & 8 Wil. 3. c. 3. s. 10., properly construed to mean, that every of them shall have of *freehold or of freehold and copyhold*, &c. (so that he must have *some freehold*); so also, by comparing the same words with the regulation in the stat. of Hen. 5., the true construction seems to be, that if the jurymen has *freehold and copyhold* of the value of ten pounds a-year, but not freehold alone of that value, the free-

hold, which he has, must at least be of the clear value of *forty shillings* by the year.

NOTE D. p. 20.

The report of the death of Lord Essex arrived in Court, while Lord Howard was giving his evidence. Roger North gives the following account of this circumstance. "The rumour came in at the door of the Court, and spread all ways, as the folks told it to each other; for the crowd was such, none could get in so suddenly as that came. And the counsel, that sat below, had it before the bench; but it seemed to be forwarder towards the prisoner, than it was there; and I am apt to believe that, if there was any express haste in the bringing the report, it lay on the side to inform him. I remember the judges, observing some disorder in the company, stood up, to see what was the matter, and some one asked, and thereupon the Attorney-General stood up, and turning to the Chief Justice, told him softly, that there was news, the Earl of Essex had killed himself; and thus, in the main, there was a sort of pause or stop of the business for a while, as must of necessity be, while people were telling this to one another. The only notice of it in public was from the Lord Howard, who, in the beginning of his evidence, made a whimper, and wiped his eyes, as for a departed relation, and then went on, as the trial shews." See *Examen*, p. 402. Roger North also adds, "that neither direct nor indirect use was made of the accident, so as to touch the prisoner at the trial."

The latter part of this statement, namely, that the death of Lord Essex was noticed at the trial only by Lord Howard, is not true. It appears

from the report of the trial, that Sir R. Sawyer in his opening speech, and Sir G. Jefferies in his summing up, most unfairly turned the circumstance to the prejudice of the noble prisoner. The former said, that Lord Essex, who was one of the council with Lord Russell, *had prevented the hand of justice upon himself* (P. 595.); and Sir G. Jefferies said, "Who should think that Lord Essex, who had been advanced so much in his estate and honour, should be guilty of such desperate things; which, had he not been conscious of, he would scarcely have brought himself to that untimely end, to avoid the methods of public justice." (P. 633.)

The circumstances of the death of Lord Essex are noticed by Evelyn in his Journal, vol. i. p. 520.

NOTE E. p. 37.

The summing up of the evidence of Sheppard, as given in the report, has this passage. "*He says, there was some discourse of a rising or insurrection, that was to be procured within the kingdom; but he does not tell you the particulars of any thing.*" Observe the evidence, given by Sheppard in p. 601. The question put to him was this: "Besides the seizing of the guards, did they discourse about rising?" to which he answered, "*I do not remember any further discourse.*"

Again, in the summing up of Rumsey's evidence, there is the following passage: "You hear, he says, there was at that meeting some discourse concerning the inspecting of the King's guards, and seeing how they kept themselves, and whether they might be surprised; and this, he says, was all in order to the rising." The evidence will be found

to be as follows; the Attorney-General asked, "To what purpose was the view?" Colonel Rumsey answered, "*To surprise them, if the rising had gone on.*" It has been before shewn, that these latter words were not used by any of the party; but referred to the subject matter of a former meeting, at which Lord Russell was not present. The witness expressly admits, in another place, that "*there was no debate about a rising.*" (See p. 599.)

Another passage, in the summing up of the same witness's evidence, was this, "*You hear, he says, they did design a rising; he says, there was a rising designed in November.*" This appears to have been information derived from Lord Shaftsbury; and if so, it could not properly be admitted as evidence. It is clear, from other parts of this witness's evidence, that the rising had been given up, in consequence, as it was said, of the failure of Trenchard; and that there was no debate about any intended rising at the meeting, which Lord Russell attended.

NOTE F. p. 39.

Lord Russell, at the time of his death, delivered a paper to the Sheriff, in which he entered into a full explanation of his conduct. A statement at such a moment, from a person of his unimpeachable honour and veracity, will be thought worthy of attention. The passages, in which Lord Russell gives his account of what passed at Sheppard's house, are in these words: "As to the seizing of the guards, I shall give this true and clear account. I never was at Mr. Sheppard's with that company but once, and there was no undertaking then of securing or seiz-

ing the guards, nor any appointed to view or examine them. Some discourse there was about the feasibility of it; and several times by accident, in general discourse elsewhere, I have heard it mentioned, as a thing that might easily be done; but I never consented to it, as fit to be done. I remember particularly at my Lord Shaftsbury's, there being some general discourse of this kind, I immediately flew out, and exclaimed against it, and asked, if the thing succeeded, what must be done next, but massacring the guards, and killing them in cold blood, which I looked upon as so detestable a thing, and so like a Popish practice, that I could not but abhor it. And at the same time the Duke of Monmouth took me by the hand, and told me very kindly, 'My Lord, I see you and I are of a temper; did you ever hear so horrid a thing?' And I must needs do him the justice to declare, that I ever observed in him an abhorrence to all base things.

"As to my going to Mr. Sheppard's, I went with an intention to taste sherry; for he had promised me to reserve for me the next very good piece he met with, when I went out of town; and, if he recollects, he may remember I asked him about it, and he went and fetched a bottle: but when I tasted it, I said it was hot in the mouth; and desired that whenever he met with a choice piece, he would keep it for me; which he promised. I enlarge the more upon this, because Sir George Jefferies insinuated to the jury, as if I had made a story about going thither; but I never said that was the only reason: and I will now truly and plainly add the rest.

"I was, the day before this meeting, come to town for

two or three days, as I had done once or twice before ; having a very near and dear relation lying in a very languishing and desperate condition. 'The Duke of Monmouth came to me, and told me, 'he was extremely glad, I was come to town ; for my Lord Shaftsbury and some hot men would undo us all, if great care be not taken ; and therefore use your endeavours with your friends, to prevent any thing of this kind.' He told me, there would be company at Mr. Sheppard's that night, and desired me to be at home in the evening, and he would call me, which he did. And when I came into the room, I saw Mr. Rumsey by the chimney, although he swore he came in after ; and there were things said by some with more heat than judgment, which I did sufficiently disapprove, and yet for these things I stand condemned : but I thank God, my part was sincere and well meant. It is, I know, inferred from hence, and was pressed on me, that I was acquainted with these plots and ill designs, and did not discover them. This is but misprision of treason at most. So I die innocent of the crime, for which I stand condemned, and I hope no body will imagine, that so mean a thought could enter into me, as to go about to save myself by accusing others. The part that some have acted lately, of that kind, has not been such as to make me to love life at such a rate."

Evèlyn has noticed, in his Journal, the death of Lord Russell. "Every one deplored Essex and Russell ; especially the last, as being thought to have been drawn in, on pretence only of endeavouring to rescue the King from his present counsellors, and the nation from arbitrary government, now so much ap-

prehended; while the rest of those who were fled, especially Ferguson and his gang, had doubtless some bloody design, to set up a commonwealth, and turn all things topsy-turvy." Evelyn's Mem. vol. i. p. 522.

In another passage, Evelyn writes thus: "Lord Russell was beheaded in Lincoln's Inn Fields, the executioner giving him three butcherly strokes. The speech made by my Lord, and the paper he gave to the Sheriff, declaring his innocence, the nobleness of the family, the piety and worthiness of the unhappy gentleman, wrought much pity, and occasioned various discourses on the plot." Evelyn's Mem. vol. i. p. 524.

NOTE G. p. 44.

The statute of treasons, 25 Edw. 3., expressly enjoins, that the accused is to be "attainted of the compassing and imagining the King's death, by the jury, provably of open deed," that is, on sufficient proof of open deed: so that the jury are to decide, as to such traitorous imagination and design on the proof of the overt act; and the overt act is not only the act alleged to be done in order to carry the imagination into effect, but it is also the evidence of such traitorous design. Whether the engaging in a conspiracy, of the nature above described, is *by presumption of law* a compassing and imagining of the death of the King, — or whether it is merely *evidence*, cogent perhaps and convincing in point of effect, but still *only evidence* of such compassing, — is a question of some importance; though not now of such general importance as formerly; since the stat. of 36 G. 3. c. 7.

s. 1., which contains many more extensive provisions on the subject of treason than the stat. of Edw. 3., has very materially narrowed such discussions, by making some acts to amount to *substantive acts* of high treason, which before could only be laid as *overt acts*.

There appear, indeed, to be some few recent authorities, in support of the former opinion, namely, that the engaging in such conspiracies is, not merely *evidence* of the compassing, (which it undoubtedly appears to be,) but that it is of itself absolutely, and *conclusively, by presumption of law*, a compassing and imagining of the King's death. (See the charge of Lord Chief Justice Eyre to the grand jury, in Hardy's case, 24 Howell, p. 203.; his summing up in the same case, p. 1361.; his summing up also in Horne Tooke's case, 25 Howell, p. 725. l. 24. The summing up of Lord Ellenborough in Watson's case, reported by Gurney, vol. ii. p. 429., adopting the opinion of Eyre C. J.

But in support of the other opinion, namely, that the proof of the engaging in such conspiracies is *only evidence* of the traitorous intent, (however strong and cogent the evidence may be,) the reader is referred to the following authorities, which are very superior to those on the other side. Sir Mat. Hale, P. C. 108, 109, 122, 148., where such conspiracies are said to be "*overt acts to prove the compassing*:" Sir Edw. Coke's 3d Inst. p. 6.* and p. 11.* where, he says, that "a preparation by some overt act to deprive the King is a sufficient" (that is competent) "*overt act to prove the compassing*:" Foster C. L. 195, 196. which agrees with the passage last cited from the 3d Inst.: and Hawkins's P. C. b. 1.

ch. 17. sect. 9. The summing up of Pemberton C. J., in Lord Russell's case. The judgment of Treby in the same case. The summing up even of Chief Justice Jeffries in Sydney's case. Lord Holt's summing up in Sir J. Friend's case, 13 Howell, p. 55. 62. Lord Ellenborough's address to the jury in Despard's case, 28 Howell, 318, 319., where he says, "the proof of such conspiracies is to be received, as the strongest and most cogent *evidence* of the compassing and imagining of the King's death." The charge of Mr. Justice Bayley to the grand jury in Watson's case, reported by Gurney, vol. i. p. 5. The summing up of the Lord Chief Justice Abbott in Thistlewood's case, reported by Gurney, p. 364. 408. The reader is also referred to the very masterly argument of Mr. Gibbs in Horne Tooke's case, 25 Howell, 455. and to the statement of the law by the Attorney-General, Sir John Scott, in Hardy's case, 24 Howell, 255. l. 26.

NOTE H. p. 53.

Hume, in his history, lays it down as proved beyond doubt, that "an insurrection had been deliberated on by the prisoner, and fully resolved; that the surprisal of the guards had been deliberated on, but not fully resolved; and that an assassination had never once been mentioned, nor imagined by him." If the remarks above made on Rumsey's evidence are just, there was neither resolution nor deliberation by the prisoner, or by any other person in his presence, on the subject of an intended insurrection, or on the subject of a surprisal of the guards.

The same writer observes, that Rumsey and Shep-

pard were very unwilling witnesses, and that, if they had pleased, they could have given more explicit testimony against him." But there is no ground for such an opinion. It is clear from the report of the trial, that Rumsey was ready to be led to any extent; and from his zeal to serve the crown, or anxiety to save himself, fell into some gross exaggerations and inconsistencies. Sheppard seems not to have overstrained his evidence so much as the other; it is certain, however, that he did not betray the least reluctance as a witness; for on the first hint he started, and, without any pressing, ran through nearly the whole course of his narrative.

In a tract, written by Sir Robt. Atkyns, and entitled "A Defence of the late Lord Russell's Innocence," the reader will find an able comment on the evidence of Rumsey. It is as follows:

"Colonel Rumsey, as to the *overt-fait*, (as they would make it) says, 'There was some discourse about seeing what posture the guards were in;' and being asked by one of the jury, by whom the discourse was? he answered, 'By all the company that was there,' (whereof, as he said before, the Lord Russell was one). So that my Lord Russell may (I agree) be understood to be one that discoursed about seeing, what posture the guards were in. Nay, the Colonel says, 'All the company did debate it:' and he says further, 'Lord Russell was there, when some of the company undertook to take the view of the guards.' And being asked by the Attorney-General, to what purpose the view was to be? The Colonel answered, 'It was to surprise the guards, if the rising had gone on.'"

"The Chief Justice observed to the witness, that he

ought not to deliver a doubtful evidence, and to speak it with limitations, which made it not so positive; as by saying, 'I apprehend so and so:' then the Colonel grows more positive, and says further, that a rising was intended; but afterwards, he says, that there was no debate of the rising. At last the witness being asked by Sir George Jefferies, whether the prisoner was present at the debate concerning the message from the Lord Shaftsbury to the company then met, and the answer returned to it; he flatly says, 'The prisoner was present at that debate,' (which debate did indeed concern the rising). Being asked by the same person, whether my Lord was averse to it, or agreeing to it; he answered like an echo, 'agreeing to it.' Nay, then he says, that my Lord Russell did speak, and about the rising at Taunton; and that he did discourse of the rising. But what were his words? Being questioned again by the Chief Justice, whether my Lord did give any consent to the rising, he answered still like an echo, 'My Lord, he did.' And this last answer is the weighty part of his evidence, if there be any weight at all."

"Now mind the defect of the witness's memory in some other most material passages. He thinks, the Lord Grey did say something to the same purpose, with the answer delivered by Ferguson to Lord Shaftsbury's message. He does not know, how often he himself (the witness) was at Mr. Sheppard's house, where this debate was. He says, that he was there more than once; 'or else I heard, says he, Mr. Ferguson make a report of another meeting to Lord Shaftsbury.' And then he says, that this was all at that time, that he remembered. Before this he had

said no more against Lord Russell, but that he was present; and after this, upon much interrogating of him, he proceeds to tell a great deal more, indeed all the rest, that has been before observed to proceed from him. And after all, he says, he thinks he was not there above a quarter of an hour. He says, he was not certain, whether he did hear something about a declaration there, or whether Mr. Ferguson did report it to my Lord Shaftsbury, that they had debated it. And the witness speaking of a view to be taken of the *guards*, to surprise them; the Lord Chief Justice seems to be surprised at that word. The guards? he never met it in all his books. What guards? Why, you know, it is mentioned in the indictment; but he might yet very well ask, what guards? And the Colonel answers, 'The guards at the Savoy and the Mews.'

"The Colonel says, he thinks the Duke of Monmouth, and the Lord Grey, and Sir Thomas Armstrong, were the persons, that undertook to view the guards; and he thinks, that Sir Thomas Armstrong began it, and Mr. Ferguson. And he says, that further direction was given to take a view of the guards, if the rising had gone on (as it never did); and then he mentions the very day, that had been appointed for the rising, viz. the 19th of November; and that the message from the Lord Shaftsbury was, (he thinks,) a matter of a fortnight before that day, or something more; for he thinks, it was concluded Sunday fortnight after my Lord Grey met. The mention of my Lord Russell's consent to this rising, comes in at the last; after many questions asked him, and not till that very particular question was put to him; and he answers in the

very same words as the question was asked. The Chief Justice asked him in these words: Did my Lord give any consent to the rising? The Colonel's answer was, 'Yes, my Lord, he did.' But how did my Lord Russell signify that consent? What words did he use, that may clearly express it? For this is the pinching proof. If it had been certain and cleared by remembering the manner of his consenting, or how it did appear; why was not this put home to the witness? This is the material part of his evidence, without which, the rest had not come home to the prisoner. And why did not the witness deliver this of himself? Before his giving this home evidence, he had said, 'That was all at that time, that he remembered:' and this was at the same time with that of the message, and of the discourse about viewing the guards. He afterwards doubts, whether he was any more than once there with that company, or whether he heard Mr. Ferguson report things to the Lord Shaftsbury; which shows a wild kind of memory in a witness, and the Colonel is no fool, nor baby; so that there is but one time positively spoken of by this witness. How strangely uncertain is he in the matter of the declaration, to which he was examined! A most noted thing! And he cannot tell, whether he heard any thing of it there, or whether Mr. Ferguson told him of it. It is to be suspected too, that what he has delivered positively at last, so late in his evidence, and after so much interrogating of him, was but mere hearsay too, and then it would not have been any evidence. He has not, it seems, a good distinguishing head or memory, as a witness ought to have in a case of life, and life of so high a value as this

of that noble Lord. And many other material passages this witness delivers under the limitation, *as he thinks.*"

"The rising was intended, but never took effect; and the view was no more than appointed and undertaken; but the seizing of the guards, as this witness says, was not to be, unless the rising had gone on, which it never did. He speaks nothing of any view made of the guards, or of any report upon it. But he swears, my Lord Russell consented to the rising. That is his stabbing evidence; but by what words, or how he signified his consent, not a word, though mighty material." (See Sir Rob. Atkyns's Tracts, p. 363. 9 Howell, 732.

THE TRIAL
OF
ALGERNON SYDNEY,
IN THE KING'S BENCH,
FOR HIGH TREASON.

35 Cha. II., 1683.—9 *Howell*, 818.

ALGERNON SYDNEY, son of the Earl of Leicester, was committed to the Tower, on the 26th day of June, the day before Lord Russell's commitment, and tried on a charge of high treason, in the Court of King's Bench, before the Lord Chief Justice Jefferies.* The first proceeding commenced on the 7th of November, 1683. The indictment was then read over, and Sydney called upon to plead. The treason, charged in the indictment, was P. 818. the compassing and imagining the death of the King. The overt acts of this treason were, the

* Sergt. Jefferies was appointed Lord Chief Justice of the King's Bench, on the death of Chief Justice Saunders.

conspiring with traitors to depose and kill the King, and to raise an insurrection and rebellion in the kingdom, for the purpose of overthrowing the government; the sending one Aaron Smith into Scotland, in order to invite persons in that kingdom to come into England, and assist in carrying into execution their traitorous designs; and, lastly, the composing and writing a false and seditious libel, (part of which was set out in the indictment,) with intent to persuade the people of the lawfulness of rebellion.

P. 820.

After the indictment had been read over, Sydney urged, that he found in it a heap of crimes put together, distinct in their nature, and distinguished by law; and he therefore conceived, that the indictment was void. The Chief Justice informed him, that he must either plead guilty, or not guilty. Sydney begged the Court to direct him; for he was ignorant, he said, in matters of law, and might be easily surprised; that he was never before at any trial, and had never read a law-book. The Chief Justice replied, that the Court was bound both by their oaths, and by the duty of their places, to take care, that no wrong should be done to him: but that now he must either plead guilty or not guilty, or

might demur, which would be a confession in point of law. Sydney still insisted, but in the most respectful language, that there might be indictments, which are erroneous; and if they are erroneous and vicious, they are null, and ought not to be answered. "Put in what plea, you shall be advised," said the Chief Justice; "but if you put in a special plea, and the Attorney-General demurs, you may have judgment of death; for by that you wave the fact." After some other remarks of the same description, Sydney gave way. "Why, then, if you drive me upon it, I must plead." He then pleaded not guilty.

The Chief Justice peremptorily overruled the plea, pleaded by Sydney, at the same moment that he declared, the Court was bound by oath, and by the duty of their office, to see that no wrong should be done to him. The rejection of this plea, which was a plea in abatement, and stated exceptions to the indictment, could not be justified. A plea in abatement of the indictment, before the plea of not guilty, is the undoubted right of the prisoner; and was so, long before Sydney's trial. It is not true, that judgment on the plea would be conclusive, or that judgment of death could pass. Such

pleas are of little avail, indeed, because, if the exceptions are material, a new bill may be sent before the grand jury ; and the same exceptions may be taken after the trial, as before. But still, it was the undoubted right of the prisoner to take exceptions to the indictment, before he pleaded not guilty.

The Attorney-General applied to the Court to fix a day for the trial, proposing the interval of a week. The prisoner asked for a fortnight, which was granted. He then applied for a copy of the indictment, which was refused.

P. 836.

Sydney was brought to the bar of the Court of King's Bench for trial, on the 21st day of Nov. ; when he again insisted, that he ought to have a copy of the indictment. But the Chief Justice stated, that all the judges had determined in Lord Russell's case, that a copy could not be granted. "Therefore, arraign him upon the indictment ; we must not spend our time in discourses, to captivate the people." As the jury panel was read over, he challenged several persons, as not being freeholders ; but the Court determined, on the authority of Lord Russell's case, that this was not a sufficient cause of challenge.

[NOTE A.]

P. 838.

The Attorney-General, Sir Robert Sawyer,

stated the case for the prosecution ; and the counsel for the crown proceeded to call their witnesses.

West was the first witness for the prosecution. P. 845. He was required to give an account of "what he knew concerning *the general insurrection intended in England.*" Sydney suggested, that it would be proper to confine the witness to what he knew relating to his conduct alone, and that he ought not to be prejudiced by any account of what others might have done, or said, who were not connected with him. The Chief Justice remarked, that, in all the trials for the Popish Plot, a general account of the conspiracy was first given in evidence ; assuring the prisoner, that nothing but legal evidence should be admitted against him. The same question was then repeated : upon which the witness set off, and ran through his narrative, without pause or break. First, he gave an account, which he said he had heard from Walcot, concerning some design of Lord Shaftsbury. (This Walcot had been attainted of treason.) He then repeated what he professed to have heard from Rumsey, respecting some persons of quality, who, it was said, intended to make an insurrection, and of whom Sydney was said to be

one. — As Rumsey was one of the witnesses on this trial, and the next to be called, there was less excuse in this instance, than in the preceding, for offering such hearsay.

The witness was proceeding to state, what some person informed him, that the prisoner had said; when Sydney, apologizing for the interruption, began to object to such hearsay: but the Chief Justice stopped him, and peremptorily desired him not to interrupt the witness. West then continued to state, what, he said, he had heard from Nelthorpe, as to the sending of Aaron Smith into Scotland; and afterwards what he had heard from Ferguson. Ferguson at that time was an outlaw, under a charge of treason. The witness concluded thus: "As to the prisoner in particular, I know nothing, and did never speak with him, till since the discovery."*

P. 847.

The next witness was Rumsey. He spoke of a meeting at Sheppard's house, and of another at the house of West; at the latter of which there was a debate respecting a rising

* The hearsay evidence of West was rejected by Chief Justice Pemberton, on the trial of Lord Russell. And Jefferies knew that it had been rejected, having been one of the counsel for the crown in that case.

of the people.—Sydney was not at either of these meetings ; nor was it pretended, that he was in any manner connected with them, or implicated in any measure then brought forward. It is remarkable, that this witness did not prove the truth of any part of the statement, which West pretended to have received from him, as his informant. On the contrary, he asserted, that he had himself received precisely the same account from West. Thus, did each of these witnesses vouch the other for the truth of a report, disclaimed by both ; — a striking exemplification of the thorough deceitfulness of hearsay evidence.

Sydney at the close of this man's testimony, requested to be informed, whether it was the ordinary practice to receive such evidence, the mere hearsay of persons, whom he had never seen, or heard of, in the course of his life ? "This," said the Chief Justice, " does not affect you ; and so I tell the jury." " It prepossesses the jury," replied Sydney ; — which the Chief Justice could not deny, but still he persisted in the same course.

Keiling, the third witness, mentioned another report, which, he said, had been received from Goodenough, respecting a general insurrection that was designed, in which Sydney, it was said, was to take a leading part. P. 348.

consult on the means of raising a commotion in that kingdom. It was agreed, that Lord Melvin, Sir John Cockram, and two of the Campbels, should be invited to join the party in England. Sydney engaged to select some person for this business, and named Aaron Smith. Aaron Smith was accordingly sent to Scotland, in pursuance of the debate.

Here the evidence of Lord Howard closed. The Chief Justice inquired, whether Sydney wished to ask the witness any questions? "None," said Sydney; "I have no question to ask Lord Howard." "Silence!" said the Attorney-General.—"You know the proverb!"

P. 852.

Sir Andrew Foster proved, that Sir John Cockram, and two of the Campbels, shortly afterwards came up from Scotland; and as soon as the rumour of a conspiracy was abroad, that they absconded. Atterbury also spoke as to the fact of their absconding.

P. 853.

Sir P. Lloyd, under the authority of a warrant from the Privy Council, searched Sydney's house about the latter end of the preceding June.* He found some papers and

* Sydney was sent to the Tower on the 26th of June. He was tried on the 21st of November. (See 9 Howell, 1006. 1013.) Sydney seems to have asserted, in one part of his defence, that the papers, given in evidence, had been found in his house *after his imprisonment*. (See p. 868.)

writings on the table, which he seized and took into his possession, in Sydney's presence. He now produced some, which he believed to be part of those papers.

The three next witnesses, Sheppard, Cary, P. 222. and Cooke, were called, for the purpose of proving the papers to be in Sydney's handwriting. Sheppard had seen him write the indorsements on several bills of exchange; from which he had become acquainted with his handwriting; and he said, he believed the several sheets of paper, shown to him, were Sydney's handwriting. Cary had not seen him write; but had seen indorsements on bills, which had come into his hands, as Sydney's indorsements; and these, he said, were like the handwriting in the papers. Cooke had paid bills of exchange indorsed with Sydney's name, and had never been called upon to account for mispayment; he stated that the handwriting of the papers, shown to him, was like that of the indorsements. [NOTE B.]

The Attorney General then desired to have those parts of the papers read in evidence, which were set out in the indictment. Sydney suggested, that the papers, which contained those passages, should be read entire, in order that the

THE TRIAL OF

general tendency and character of the writings might be better understood. But the Chief Justice refused this, observing, that any passage, pointed out by the Attorney General, should first be read, and that afterwards any other part should be read, which the prisoner might desire. The passages, set out in the indictment, were then read, from a written tract, which purported to be an argument in answer to Sir Robert Filmer's Patriarcha. The scope of the argument appeared to be, to maintain, in opposition to Sir Robert Filmer's doctrine of non-resistance, this principle, — that Kings rule by the consent of the people, subject to the controul of parliament, and amenable to the people for acts of misgovernment; and that, in extreme cases of tyranny and oppression, resistance would be justifiable.

P. 859. The papers were here shown to the prisoner.

Sydney. "I know not what to make of it. I can read it."

L. C. J. "Aye, no doubt of it; better than any man here. Fix on any part, which you have a mind to have read."

Sydney. "I don't know what to say to it, to read it in pieces thus."

L. C. J. "I perceive, you have disposed them under certain heads. What would you have read?"

Sydney. "My Lord, let him give an account of it, that did it."

A record of the conviction of Lord Russell P. 849. was then produced, and read without objection. It was further proved by Lord Howard, that he had been a witness on the trial of Lord Russell. [Note C.]

Several witnesses were called by Sydney, Defence, in his defence, to contradict Lord Howard. Lord Anglesey and Dr. Burnet gave the P. 862 same evidence, which they had before given on the trial of Lord Russell.* Lord Clare stated, that Lord Howard, in speaking to him of the report of the conspiracy, had in the strongest manner asserted Sydney's innocence. Tracey and Penwick gave evidence to the same effect. Lord Paget and Mr. Howard P. 871, proved, that Lord Howard had declared to them his ignorance of the plot, and spoke of it as a sham plot, forged in the dark by Jesuits. Blake stated, that Lord Howard P. 875. had mentioned to him the circumstance of

* See *supra* p. 31.

his having a promise of pardon, but that he had lately heard nothing further on the subject; from which he concluded, that he was not to have his pardon, till the drudgery of swearing was finished. The last witness was

P. 876. a person conversant with handwriting, who stated, that the character of the writing in the papers, which had been given in evidence, was the easiest to be imitated, that he had ever seen; — an opinion, not entitled to much consideration, after the proof, which had been produced, that those papers were found in the prisoner's possession.

Sydney defended himself with the spirit and courage, which marked his character; and though frequently interrupted by the Chief Justice, and diverted from the course of his observations, preserved throughout the trial his temper and self-possession undisturbed. He solemnly affirmed, that he had never entertained the design imputed to him, of destroying the King; and none, who knew him, would suspect him of such an intention. The charge of conspiring to kill the King, was as unfounded in proof, as it was false in fact: not a word had been uttered, nor a thought expressed by him, to give a colour to such a charge.

With regard to the alleged conspiracy, to levy

war and raise rebellion, he argued, in point of *law*, that such a conspiracy is not any proof of a design to destroy the life of the King; that such designs are entirely distinct, and the one has no necessary connection with the other; that although the destruction of the King might possibly ensue on the levying of war, yet in many instances it had been known to be otherwise, nor could it be justly considered as a natural or necessary consequence. As to the *fact* of conspiring to raise an insurrection, the only witness against him was Lord Howard; but the evidence of a single witness on a charge of treason, was by law insufficient; and, besides, no reliance could be placed upon a man, who had given so many contradictory accounts, and who, by speaking against others, expected to gain a pardon for himself. He denied the truth of Lord Howard's statement, and affirmed, that they had not formed any plan, nor had any settled design; but only spoke at large of what might, or might not be done, and what was likely to happen.

But the incredible account of Lord Howard was to be patched up by papers, found in a private closet! He insisted, that he was not bound by law to give an account of such

papers. The writing was not proved upon him; and, if proved, it was not a crime. It would be the extreme of injustice, and contrary to all law and reason, to charge him with a treasonable design, for having in his possession such speculative writings — papers found in an unfinished and imperfect state, written many years before, not proved to have been shown, or seen, or intended for publication, not composed with a view to any particular occasion, or to any individual government, not connected with any political plan or design, nor of a character likely to excite rebellion; but a mere political argument, written on general principles, and intended solely to oppose the dangerous tenets of a certain political writer. What could be more absurd, than to pretend, that the papers, written perhaps twenty years before, perhaps even more, could have the least bearing on any recent design? What more unjust, than to select scraps from a great number of papers, in order to found upon them some partial inference and conclusion, as to the intentions of the writer, which could be fairly collected only from the tenor of all the writings taken together? In writing his private thoughts, and discussing such speculative subjects, he had done only what is daily and lawfully practised by men of studious habits. To think, and to write his

thoughts, is the privilege of every man ; and, until he impart them to others, or publish them to the world, he is not responsible for them to any person, nor amenable to the laws of his country.

The Solicitor-General, Finch, replied on the P. 880. part of the crown. He argued at great length, that the papers which had been found in Sydney's desk, in his handwriting, were of a treasonable nature, and manifested a compassing and imagining of the death of the King ; that the writing of these papers was an overt act of such compassing ; that they were in the place of another witness, and more than two witnesses against the prisoner ; and that these papers, together with the evidence of Lord Howard, who proved the conspiracy to rise, were competent and sufficient proofs of the treason charged in the indictment. The doctrines in the written papers, which he insisted on as principally manifesting the treasonable design of destroying the King, were the following : " That the King derives all his power from the people ; that it is originally in the people ; that the measure of subjection must be adjudged by the Parliament ; and if the King does fall from doing his duty, he must expect, that the people will exact it." And, added the

Solicitor-General, "this is the more dangerous conspiracy in this man, by how much the more it is rooted in him; and how deep it is, you hear, when a man shall write as his principle, that it is lawful to depose Kings, if they break their trust, and that the revolt of the whole nation cannot be called rebellion. It will be a very hard case, when people act thus according to their consciences, and do all this for the good of the people, as they would have it thought. But this is the principle of this man."

Summing
up.

The Chief Justice Jefferies summed up the case, with great care, in a speech of considerable length; in which he took an opportunity of answering every argument urged in the defence, and pressed every topic of attack strongly against the accused. He laid down the law, with reference to the charge of treason, in the following words, which are remarkable, and appear to be the only unexceptionable part of his summing up. "On an indictment for compassing the death of the King, the conspiracy to levy war may be given in evidence, to prove the conspiracy of the King's death; for if a man declare the imagination of his heart by an overt act, which naturally evinces, that the King must be de-

posed, destroyed, imprisoned, or the like, it will be sufficient *evidence of treason*."

He adverted to the hearsay evidence, which had been admitted to such excess at the beginning of the trial. "Whatever," said he, "happens to be hearsay from others, is not to be applied immediately to the prisoner. However, those matters, that are remote at first, may serve for this purpose, to prove that there was generally a conspiracy to destroy the King and the government. Besides, added the Chief Justice, this is made use of, as a circumstance to support the credibility of the witness; and is thus far applicable to the business before you, that it is plain, by the evidence of persons who do not touch the prisoner at the bar, (and I am sorry, any man makes a doubt of it at this time of day,) that there was a conspiracy to kill the King. For after so full a proof in this place and in others, and the execution and confession of several of the offenders, I am surprised to observe, that the prisoner at the bar, and some others present, seem not to believe it." He then repeated the whole of the hearsay evidence, with the utmost minuteness.

After having gone through the account given by Lord Howard, relative to the design of

the select council, he observed, that some circumstances were proved to have been in pursuance of their design, namely, the arrival of the persons invited from Scotland, and their absconding on the first report of a conspiracy. "Now, I must inform you," added the Chief Justice, "that in case there be but one witness to prove a direct treason, and another witness to a circumstance, which contributes to that treason, this will make two witnesses, to prove the treason." Not long ago, all the Judges of England were commanded to meet together, when the senior of the King's counsel was pleased to put this case: "If I buy a knife of I. S. to kill the King, and it is proved by one witness, that I bought a knife for this purpose, and another proves that I bought such a knife of I. S., they are two witnesses sufficient to prove a man guilty of high treason; and so it was held by all the Judges of England then present, in the presence of the King's counsel."

But, supposing all this not sufficient, proceeded the Chief Justice, here is a libel; and it is a most traitorous and seditious libel. "If you believe, that it was Colonel Sydney's book, and written by him, no man can doubt, but that it is sufficient evidence, that he is guilty of compassing and imagining the death

of the King." In another passage, he said, "This book contains all the malice, and revenge, and treason, that mankind can be guilty of. It fixes the sole power in the Parliament and in the people; so that he carries on the design still; for their debates at their meetings were to that purpose." In another passage, "I must tell you, I think I ought more than ordinarily to press this upon you, because I know that the misfortune of the late unhappy rebellion, and the bringing of the late blessed King to the scaffold, was first begun by such kind of principles." After adverting again to Sydney's writings, he said, "The case does not rest upon two witnesses, but upon greater evidence than twenty-two, if you believe this book was written by him." At the conclusion, he informed the jury, that an indictment had been preferred on less evidence, against Lord Russell, and that he had been convicted and executed.

Another Judge (Withens) expressed his P. 895. concurrence in all the points of law laid down by the Lord Chief Justice, and concluded thus: "Colonel Sydney says, 'Here is a mighty conspiracy, indeed, and nothing comes of it!' Whom must we thank for that? None but Almighty Providence! One of

themselves was troubled in conscience, and discovered it. Had not Keiling discovered it, God knows, whether we might have been alive at this day." — The Jury then withdrew, and in about half an hour, returned with a verdict of Guilty.

P. 897.
Judgment.

Algernon Sydney was brought to the bar to receive judgment, on the 26th of November, 1688. He urged again the objections which he had before taken, and which were again overruled. He particularly insisted, that his objection to some of the jury, on the ground of their not being freeholders, had been illegally disallowed. The Chief Justice answered, that the Judges of England had adjudged, in Lord Russell's case, such a challenge to be insufficient. One of his causes of complaint, and rather a singular one, was, that the Chief Justice had promised to inform the jury, in the summing up, what evidence had reached him, and he did not remember that this had been done. "I did it particularly," answered the Chief Justice; "I think I was as careful of it, as possibly I could be." And, it must be allowed, that in this instance he had scrupulously kept his promise.

One of the counsel at the bar, as *amicus curiæ*, suggested an objection to the indict-

ment, that the King's title of *Defensor fidei* had been omitted. "We thank you for your friendship," answered the Chief Justice, "and are satisfied upon that."

The judgment for high treason was now pronounced. "Then, O God! O God!" exclaimed Sydney, "I beseech thee to sanctify these sufferings unto me, and impute not my blood to the country, nor to the city, through which I am to be drawn. Let no inquisition be made for it; but if any, and the shedding of innocent blood must be revenged, let the weight of it fall only upon those, who maliciously persecute me for righteousness's sake."

"I pray," said the Chief Justice, "I pray God to work in you a temper fit to go into the other world; for I see, you are not fit for this."

"My Lord," (replied Sydney, stretching forth his arm,) "feel my pulse, and see if I am disordered. I bless God, I never was in better temper than I am now." — Thus closed this memorable trial.

The conduct of the Chief Justice Jefferies, Remarks. in this case, has been universally reprobated. His summing up exhibits a complication of such gross perversions of law, as are not to be paralleled in any other state trial on record. To mention only a few particulars: — He de-

clared to the jury, that the hearsay evidence of persons, who were strangers to the prisoner, was admissible as legal proof of a general conspiracy, and as confirmation of the general narrative of the witnesses; — thus attributing to it the utmost possible effect. He held it to be law, that, if one witness prove an overt act of treason, and another witness prove a circumstance in confirmation of the former, (though not itself of a treasonable nature, but perfectly indifferent,) these would be two sufficient witnesses to prove the treason. He relied on the conviction of Lord Russell, as an argument for the conviction of Sydney. To conclude, he laid down, in the strongest terms, that the papers, found in Sydney's closet, were competent and sufficient evidence of the treason charged in the indictment; although these papers were nothing more than a speculative and controversial disquisition on political subjects, written apparently many years before, not relative to the treasonable practices charged in the indictment, and entirely unconnected with any political design.

Bill of reversal.

The attainder of Algernon Sydney was reversed by an Act of Parliament, passed in the first year after the Revolution; and all the pro-

ceedings were ordered to be cancelled and destroyed, never to be visible in after-ages. That act recites, as the grounds of the reversal, the following defects: — an illegal return of jurors; the denial of lawful challenges for want of freehold; the insufficiency of legal proof to establish the charge of treason; that a paper found in Sydney's closet, supposed to be his handwriting, was not proved, by the testimony of any one of the witnesses, to have been written by him, but that the jury were directed to believe it, by witnesses comparing it with other writings; that, besides this paper so produced, there was only one witness to prove any matter against the accused; and that, in declaring the nature of the treason charged against him, a partial and unjust construction had been put upon the statute.

One part of this recital respecting the proof of handwriting, is not correct; if it is intended to represent, that the papers, found in Sydney's closet, were compared at the trial with other papers, in order to discover a resemblance in the character of the writing. The only comparison, that was made, was a comparison, in the minds of the witnesses, between the general character of the writing in the papers, (produced in evidence, and alleged to be

Sydney's,) with the general character of other specimens of writing by the same person, not produced at the trial, but which had been seen by the witnesses on some former occasion. Whenever any person is charged, as the writer of a paper, the writing of which has been secret and unseen, this medium of proof, (however weak and fallacious it may be, in some instances,) is the only one, which the nature of the case will admit; and the competency of such proof is now fully established by many decisions, as well in criminal as in civil cases.

On the subject of these writings, the strong and decisive objection against their admissibility, is that before mentioned, (which, it is remarkable is not noticed in the act of reversal,) namely, that they were not proved to be connected with any design, or in any manner to relate to the treasonable practices charged in the indictment. If they had been written by Sydney, relative to those treasonable practices, it is unquestionably true, that they might have been read in evidence against him, although they had never been published.*

* On this subject see Foster, 198., and the Case of Pine, in vol. i. p. 89.

The rejection of the challenges, which were made by Sydney, on the ground of a defect of freehold, appears not to have been warranted by law.* And the other ground of reversal, as to the insufficiency of legal proof to establish the charge of treason, is well founded. For, with the exception of the written papers, the only material evidence is that of Lord Howard ; and, in a case of high treason, a single witness is insufficient. [NOTE D.]

* See Note C, in Lord Russell's case.

NOTES.

NOTE A. p. 90.

It is remarkable, that this circumstance is not noticed in the report of the trial, published under the *Imprimatur* of the Chief Justice. But it is stated in the act, by which Sydney's attainder was reversed. (See 9 Howell, 997.) The Chief Justice also adverted to it in his summing up; and Sydney complained of the disallowance of the challenges, when called to the bar to receive judgment.

NOTE B. p. 97.

It is not stated in the report, whether the name of Sydney appeared as a signature in the papers produced in evidence. If it did, the recollection, which the witnesses had, of his signature on other papers, would enable them to speak to this also, with some degree of certainty; as, in the writing of a signature, there is always something peculiar. If it did not appear, such witnesses would scarcely be competent to speak to the genuineness of the handwriting in several hundred sheets of paper. But the solid and true objection to the admissibility of the writings, was, that they had no reference to any treasonable plot or design. If they had been connected with such a design, they would doubtless have been admissible, as papers found in the prisoner's possession, even without any proof of their being in his handwriting.

NOTE C. p. 99.

The conviction of Lord Russell could not, on any legal principle, be admitted in evidence against Sydney, who was a stranger to those proceedings, and had no opportunity of controverting them, or of making his defence against them. Nor, on the other hand, if Lord Russell had been acquitted, would the proof of his acquittal have been legitimate evidence in favour of Sydney. For the opinion of a jury, in a former prosecution, as to the innocence or guilt of a prisoner, (which must be supposed to have proceeded on the evidence then produced,) could not afford any reasonable inference, to guide the judgment of a different jury, on a different state of facts, as to the guilt or innocence of another person.

It is true, that in a modern state trial, (the trial of Horne Tooke,) the counsel for the prisoner were allowed to give in evidence the acquittal of Hardy, who had been before tried, on a similar charge. They offered this in evidence, for the purpose of showing, that one of the persons, indicted upon the record, had not been guilty of the conspiracy; the charge against Horne Tooke being, that he had conspired with certain other persons, of whom Hardy was one. The Attorney General, it is to be observed, waved all objection to this evidence. The Lord Chief Justice Eyre, after making some preliminary observations, said, "The point, to which, it seems to me, it may properly be evidence, and to that point only, is so far as the acquittal of Hardy will go, to contradict the evidence, *that tends to fix upon Hardy, particularly, the being a party in this conspiracy.* There is a great deal of evidence

that goes to that point, which has been made use of on this trial, and which has an application beyond Hardy; but as far as it directly points to Hardy, to be sure it is (as it seems to me) an answer to that evidence, that Hardy stands acquitted." The other judges gave no opinion upon the point; and the evidence was admitted. It is to be remembered, however, that the Attorney General waved all objection; consequently the point was not much discussed or considered. (See 25 Howell, 447.) But, supposing this record of acquittal to have been strictly admissible, — a point, which need not now be discussed, — it was only under the peculiar circumstances of that case. And there is no principle of law, upon which it can be maintained, that the record of the conviction of Lord Russell could be admitted in evidence against Sydney.

NOTE D. p. 113.

In the Journal of Evelyn, there is a passage, which notices the Chief Justice Jefferies, and Algernon Sydney; and, what is of more value, shows the opinion of moderate men on the subject of this trial. Speaking of a wedding in the city, to which he was invited, he says, "There was at the wedding the Lord Mayor, the Sheriff, several Aldermen, and persons of quality; above all, Sir George Jefferies, newly made Lord Chief Justice of England, with Mr. Justice Withens, who danced with the bride, and were exceeding merry. These great men spent the rest of the afternoon, till eleven at night, in drinking healths, taking tobacco, and talking much beneath the gravity of judges, that had but a day or two before condemned Mr. Algernon Sydney, who was executed the 7th, on Tower Hill, on the single testimony of that monster of

a man Lord Howard of Escrick, and some sheets of paper taken in Mr. Sydney's study, pretended to be written by him, but not fully proved, nor the time when, but appearing to have been written before His Majesty's restoration, and then pardoned by the act of oblivion; so that though Mr. Sydney was known to be a person obstinately averse to government by a monarch, (the subject of the paper was in answer to one of Sir R. Filmer,) yet it was thought, he had very hard measure. There is this yet observable, that he had been an inveterate enemy to the late King, and in actual rebellion against him; a man of great courage, great sense, great parts, which he showed both at his trial and death; for, when he came on the scaffold, instead of a speech, he told them only, that he had made his peace with God, that he came not thither to talk, but to die; put a paper into the sheriff's hand, and another into a friend's, said one prayer as short as a grace, laid down his neck, and bid the executioner do his office." Vol. i. p. 566.

In another passage, Evelyn notices the elevation of the Chief Justice to the chancellorship. — "I dined at our great Lord Chancellor Jefferies, who used me with much respect. This was the late Chief Justice, who had newly been the Western circuit to try the Monmouth conspirators, and had formerly done such severe justice amongst the obnoxious in Westminster Hall; for which His Majesty dignified him, by creating him first a Baron, and now Lord Chancellor. He had some years past been conversant at Deptford; is of an assured and undaunted spirit, and has served the Court interest on all the hardest occasions; is of nature cruel, and a slave of the Court." Vol. i. p. 617.

THE TRIAL
OF
JOHN HAMPDEN,
AT THE KING'S BENCH,
FOR A HIGH MISDEMEANOR.

36 Charles II. 1684. — 9 *Howell*, 1054.

THE subject of this trial, was the grandson of the celebrated Hampden, who resisted the arbitrary levying of ship-money in the early part of the reign of Charles the First.

After the commitment of Lord Russell and Algernon Sydney to the Tower, on charges of high treason, Hampden was brought before the Cabinet Council for examination.* Questions were put to him by the Lord Keeper North, and by the King, who pressed him

* See the Report of a Committee to the House of Lords, in 9 *Howell*, 958.

strongly to make a confession ; but he claimed the right of not being obliged to accuse himself. The council, being thus foiled, committed him to the Tower, where he was detained on a charge of high treason, for the space of twenty weeks, in the strictest custody. At the end of that time, there being only a single witness against him, he was released, much to the disappointment of his prosecutors. [NOTE A.]

P. 1054. On the 28th day of November, 1684, Hampden was brought from the Tower, under a writ of *habeas corpus*, and arraigned on a charge of misdemeanor. The trial was postponed to the sixth of February, when it commenced at the bar of the Court of King's Bench. "Gardez votres challenges," exclaimed the clerk of the crown ; and called over the jurors in order.

P. 1057. The fourth on the list being called, the counsel for the prisoner, Williams, challenged him, on the ground of his having an employment under the King, and holding an office in a royal forest. "Aye?" said the Lord Chief Justice Jefferies ; "let me hear it defended by any gentleman of the long robe, that this is a good cause of challenge." In support of the challenge, the prisoner's counsel referred to Sir Edward Coke's Institute, and Rolle's

Abridgement. “Well,” replied the Chief Justice, “make out your fact, if you have a mind; but it is well known, that neither Rolle, nor my Lord Coke, when he delivered that opinion, are to be reckoned such authorities in crown matters.” The counsel proposed to put the question to the juryman. “No,” said the Chief Justice, “make out your fact, if you will have any benefit by it; it is only a challenge to the favour, which ought not to be in the King’s case.* I am very glad, that P. 1058. we are now to debate this matter with men of the robe, because we have had a strange sort of notions and reflections, spread abroad of late; as if the judges now-a-days gave strange opinions, and as if persons, who have been blemishes at the bar, are preferred, to do strange things when they come upon the bench. But, truly, I wonder to hear, that it should be a doubt, when that which we gave as our opinion on one particular challenge,

* It was undoubtedly competent to the counsel to examine the juror on this point.—Lord Coke says expressly, “If the cause of challenge touch the dishonour or discredit of the juror, he shall not be examined upon his oath, but, in other cases, he shall be examined upon his oath, to inform the triers.” Co. Litt. 158. b. and 3 Black. Com. 364.

(that is, as to the freeholders,) was the judgment of all the judges, who held that it was no challenge; and all the counsel, concerned in that case, knew, that it was the opinion of all the judges. But now if we meet with lawyers, I shall be glad to have the matter fairly argued and debated; and, pray, show me what law or reason there is for it."

P. 1059. A desultory argument, in the form of a dialogue, ensued: in the course of which, the Lord Chief Justice several times advised the Attorney General not to insist upon the swearing of the jurymen. "It is not *tanti*," he said, "to insist upon any particular man. But I find we are in an age so full of cavils, that if we act but according to the precedents that went before us, we are thought to act as originals, and to make new laws; when, in truth, we only follow the rules, that we have received from our predecessors. I say there was no such challenge at common law, that ever I read of in any of our books; nor is it any cause of challenge, by the best authorities extant." At last, the Attorney General waved the juror, and another was called. This juror was also objected to, on the ground of his being a sergeant-at-arms, attendant on His Majesty; the Attorney

General would not insist on his being sworn, the Chief Justice declaring, that he must be sworn, if the Attorney General did not consent. [NOTE B.]

The indictment charged, that the prisoner, P. 1062. seditiously intending to disturb the peace of the kingdom, unlawfully assembled and confederated himself with divers evil-disposed persons, and seditiously consulted and conspired with them, to make an insurrection, and to provide arms ; and that, to complete this purpose, he consulted and agreed with them, to send certain persons into Scotland, to invite several evil disposed persons in that country to join in the conspiracy.

Sir Robert Sawyer, the Attorney General, opened the case on the part of the crown. He observed, that the crime, with which the prisoner was charged, had been before examined and enquired into in other trials ; yet that the party did not acquiesce in those trials. Since it had been thought, said the Attorney General, that the accused lay under great hardship, in not having the advantage of counsel, and because he could not have his witnesses examined upon oath ; the King, for this reason, had been pleased not to go so far in this case, as in the others. The prisoner, therefore, now before the Court, would have an opportunity

of clearing his innocence, if he could, by witnesses: and if there were any advantage in having counsel, this also would be allowed.

P. 1063. The counsel for the crown first called the Duke of Monmouth, as a witness, who did not appear.

P. 1065. Lord Howard was then called. He gave his evidence in the same loose and vague style, which has been before remarked in the trial of Lord Russell. He stated, that he had been taken, in the January of the preceding year, about the middle of the month, to the prisoner's house, by Algernon Sydney; where they met Lord Russell, the Duke of Monmouth, the prisoner, and Lord Essex, who with himself and Sydney made a party of six. The witness began thus:—"My Lord, after the disappointment given to an undertaking, which was begun by Lord Shaftsbury in October or November of 1682—after that, truly, I cannot say, but that Colonel Sydney and myself might be, and were the two first, who gave rise to the junto*: for being in dis-

* In this case the witness represented himself and Sydney, as the first movers in the business. On the trial of Sydney, he said, the first movers were the Duke of Monmouth, himself, and Sydney. (See 9 Howell, 849.) On the trial of Lord Russell, he represented the plan of the junto, as the joint plan of all the six. (See 9 Howell, 609.)

course, we said, it was absolutely necessary, that there should be some council erected, to give steadiness to the motions."

Here the Chief Justice Jefferies, interrupting the witness, desired him to give an account of the undertaking by Lord Shaftsbury. Lord P. 1066. Howard then stated, that in consequence of a message from Lord Shaftsbury, delivered by Captain Walcot, he repaired to him, at his private lodgings, in the first week of October, 1682. Lord Shaftsbury informed him, that he was obliged to withdraw from his own house, for fear of being attacked by sham plots and false evidence; the Court having possession of the juries, through the sheriffs, who had been recently forced upon the city; and that his life was no longer safe. That he was resolved, however, to make some speedy push, for the recovery of the liberties of England. That many thousands were prepared to rise in the city, and ready at any time to be drawn together, if he only held up his finger. Lord Shaftsbury also informed him, that the Duke of Monmouth and Lord Russell had unhand-somely deserted him, though they had promised to be ready in the counties, in which they had an interest; and if they had persisted in their resolution, the game could not

- have failed. Lord Howard promised to go to the Duke of Monmouth, and to expostulate with him on the business, and bring back the account of what passed between them. He then stated, that he went to the Duke of Monmouth the day after the conversation with Lord Shaftsbury, and told him what Lord Shaftsbury had said: that the Duke declared, P. 1067. "True it is, we undertook to do this, but not by the time he speaks of, and things are not ready, and he acts so preposterously, he will undo us all." Lord Howard reported this to Lord Shaftsbury, who asserted, that they were false in saying, they had not engaged, for they had engaged to be ready at the time of the swearing in of the sheriffs. P. 1068. Lord Shaftsbury sent back a message, that if they could be in readiness with what they promised from the country, he would ask nothing from the city, and take that place upon himself; but that he was resolved to go on. A meeting was arranged between the Duke and Lord Shaftsbury, but afterwards put off by the latter. Lord Shaftsbury sent a message to Sheppard's, and being disappointed by the answer, resolved to quit the country, and shortly afterwards went over to Holland, where he died.

The witness further stated, that after Lord P. 1069. Shaftsbury's death, which was about a month after his departure, he informed Sydney of all his transactions with Lord Shaftsbury, which he was before a stranger to. That after he had acquainted him with the preparations in the city, and the posture of affairs, they resolved to form a council, which should direct and regulate their movements. Sydney undertook to speak to Lord Essex and Hampden; the witness promised to see the Duke of Monmouth. That he accordingly went to the Duke, and wished him to appoint a place of meeting; but the Duke said, he knew not of any place fit for the purpose. The witness proposed a meeting at Algernon Sydney's: "But you must not expect (said he) to be treated P. 1070. as Duke of Monmouth, because he does not expect you; but take him as a philosopher, and dine with him, as he uses to dine at his own table." The Duke of Monmouth consented to go; and undertook to bring in Lord Russell and Lord Salisbury. Within a fortnight or three weeks after, Sydney came to the witness, and told him that Lord Essex was very forward in the business: that the Duke of Monmouth would prepare Lord Russell and Lord Salisbury; and he did not doubt, but that

Mr. Hampden was willing also to be in it: that they had appointed a meeting at Mr. Hampden's house, and he would conduct the business better. This was the first meeting the witness knew any thing of; and there they all six met.

Att. Gen. What was debated there?

Lord Howard. When we came there, every one discoursed, what he would. There was a discourse of the time, and places, where to rise; and, among other things, it was resolved, as a principal point, that there should be a preparation made for the design, by a treaty with those of Scotland, and an understanding settled with Argyle, and a messenger sent to Lord Argyle, and others. Before this was done, we could not be ripe for any resolution: but this must be speedily done.

L. C. J. Pray, my Lord, give me your favour, I would not interrupt you; but to make things clear as we go, I desire to ask you, when you came first to Mr. Hampden's house, who spoke first, when you were all met together?

Lord Howard. Every body discoursed, what they pleased.

L. C. J. But who gave an account of the reason of the meeting? Will you please to

recollect, and tell what you know. Who began the discourse? [NOTE C.]

Lord Howard. Something introductive to it was said by Mr. Hampden, we being at his house; as it is natural to conceive for any gentleman, at whose house people are met, to say, Pray let us sit down and talk our business. Something leading and introductive was said by him.

L. C. J. Pray, my Lord, as near as you can remember, will you give an account, what was the thing he began to discourse of? Did he seem to take any notice, or have any knowledge of your meeting, and other things before?

Lord Howard. It was a general hint and intimation to us of the ends of our meeting; that we were there come to consult and advise one with the other, how to put things into a better method and posture than formerly: and he desired that we would sit down and discourse of those things. My Lord, I would not charge myself with particulars positively.

Att. Gen. Upon what questions did you P. 1071. debate and consult, my Lord?

Lord Howard. Those were started severally. Some would speak of the time, when it should be, whether it was not convenient

now, or when. Others offered something concerning the places, whether it should be begun in the city, or in the country, or in both together. Others took into consideration, what persons were to be prepared, in the several counties, to be assisting in it. And then some discoursed concerning the raising of money, and what sum should be raised, and I think that was started by the Duke of Monmouth; but I am sure that the sum that he named was 20 or 30,000*l*. The last thing that was talked of, but which was concluded to be the thing principally to be taken care of, was the settling of such a concurrence and correspondence with Scotland, that they might chime in at the same time; that so we might give as many diversions both from home and abroad, as could be at one and the same time.

Att. Gen. My Lord Howard, did Mr. Hampden discourse of this matter?

Lord Howard. I cannot speak to the discourse of any one in particular; for I cannot say, it was put to the vote as we formally expressed it, but it may be said, we were all consenting and concurring.

L. C. J. Did any of you dissent from the rising?

Lord Howard. No, no, my Lord.

Att. Gen. Did any of you oppose it at all?

Lord Howard. No, no ; that was discoursed of, as a thing resolved.*

L. C. J. I ask you this question, my Lord Howard. Was there any sort of complaint made of the government, that it was uneasy, and that it occasioned you to enter into those debates?

Lord Howard. There was, I cannot say a complaint, because there was no person to complain to ; but it was spoken of as a matter of great grievance, that such a force and violence should be put upon the city in their election of officers, and the tendency of that as to all juries ; though I cannot distinctly remember the particular things.

* The inconsistency and selfcontradiction of this witness are very remarkable. It appears from his evidence in Sydney's trial, that the points here mentioned, were not *resolved*, but were taken as subjects for *future consideration*. (See 9 Howell, p. 850.) In Lord Russell's case, he said, " nothing was done ; but these things were offered then to *our consideration*, and we were to *bring our united advice concerning them*." (See 9 Howell, 610.) Again, in the first account given by him before the privy council, he said, " At the consultation at Hampden's house only some general heads were propounded, *which were afterwards, upon more mature thoughts, to be debated*." (See 9 Howell, 434, 435.)

P. 1072. A second meeting took place, about a fortnight afterwards, at Lord Russell's, at which the same persons attended. There they came to a resolution that some person should be sent to Scotland, and Sydney proposed Aaron Smith, to which the others consented. Sydney a few days afterwards told the witness, that Aaron Smith was gone into Scotland; and, about a fortnight or three weeks afterwards, he said, he had heard of his being at Newcastle on his way, and wondered he could not hear more of him.* Here ended Lord Howard's evidence. Hampden's counsel did not put a question to him in cross-examination.

P. 1073. The counsel for the crown then called witnesses to prove Aaron Smith at Newcastle, on his way into Scotland. Atterbury was called, to prove that he had recently seen Aaron Smith in the King's Bench prison, in the presence of two other persons, Sheriffe and Bell. And these two men were then called, to prove that they had seen the same person in Scotland.

* This fact, of Sydney having informed the witness, that he had heard of Aaron Smith being at Newcastle on his journey into Scotland, was here mentioned for the first time. Lord Howard had not alluded to it, (though, if true, it was a most striking fact,) either on his first examination before the Privy Council, or on the trial of Russell or Sydney.

Atterbury stated, that Aaron Smith was at that time in the King's Bench prison; that he was brought by writ of *Habeas Corpus* to Whitehall before the King, where these two persons, Sheriffe and Bell were also brought; that Sheriffe there owned, that Aaron Smith was the man who had been at his house; that Bell owned, that he travelled towards Scotland with him, and was hired to show him the way into Scotland; and that Aaron Smith, when he was produced, would not answer any thing at all, nor say a word.

Sheriffe stated, that the person, whom he had P. 1074. seen before the King and the Privy Council, came to his house, a public inn at Newcastle, about the middle of February in the preceding year; that he then called himself Clerk; that he staid there one night, then went away, saying he was going into Scotland; and asked for a guide. Bell went with him as guide. He returned to the witness's house in about twelve days, and went southward.

Bell said, he was directed by Sheriffe to ac- P. 1075. company the person, whom he had seen before the Privy Council, from Newcastle, on his way to Scotland: that he went to Jedburgh

with him ; waited there for him in his return, and came with him back to Newcastle.

- P. 1076. The Attorney-General then proposed to show, that Lord Melvin, Sir John Cockram, and Campbel, (the persons who, as Lord Howard stated, were invited into England,) arrived immediately after Aaron Smith's journey to Scotland, and that at the breaking
- P. 1077. out of the plot they absconded. Sir Andrew Foster stated, that, in the beginning of the preceding summer, he saw in London Sir John Cockram and Monroe and Sir George Campbel the son, and received messages also from the father of the latter : that on the discovery of the plot, Sir John Cockram absconded, and Monroe and the Campbels were taken into custody. Atterbury proved the apprehension of these and two other Scots, some of them as they were attempting to escape, and others in concealment.
- P. 1078. The Attorney-General then offered in evidence the record of the conviction of Algernon Sydney. Hampden's counsel objected to this as not admissible. "We make use of it," said the Attorney-General, "to show, that on former trials verdicts have gone upon this evidence." The counsel still insisted, that it could not be admitted, as the prisoner was neither a party

nor privy to those proceedings, and was not indicted for the same offence. The Attorney-General gave up the point, which was clearly untenable; and the case for the prosecution here closed.

The counsel for Hampden addressed the jury in his behalf. He remarked, that although Lord Howard had sworn in direct and positive terms against the prisoner, yet there were many things in his narrative highly improbable. That, in some of the less important parts of his evidence, he had mentioned minutely all the circumstances of time and place; while, in other parts, wherein greater precision was to have been expected, he was loose and general. That his story, if true, was capable of being confirmed, particularly as to the meetings at the prisoner's house and at Lord Russell's; yet his evidence was unconfirmed and unsupported. And confirmation was particularly necessary, in a case where the witness, by his own confession, was so deeply involved in the guilt of treason, if treason had been committed. "Will you not believe," said the counsel, "that he has given evidence only to save himself, and by exposing the prisoner and the blood of others, has procured himself a pardon?"

P. 1078.
Defence.

Here the Chief Justice interrupted him, observing, that he had used a harsh expression, in insinuating that the King's pardon had been procured by blood. "What do you mean by that?" said the Lord Chief Justice.

Counsel. By being a witness against the defendant and others, he has procured his own pardon.

L. C. J. That is a little harsh expression.

Counsel. My Lord, I explain myself thus.

L. C. J. It is a harsh expression, and too roundly expressed. You had need to explain yourself. As if the King's pardon were to be procured by blood!

The counsel resumed, observing, that the witness, in giving evidence against others in a case of so high a nature, would be too much disposed to strain his evidence, in order to make sure of his object; and that he could not expect a pardon, unless he pushed his evidence home against the prisoner. That Lord Howard had, on various occasions, given inconsistent and contradictory accounts on the subject of the alleged conspiracy; and had been often heard to protest, with the most solemn asseverations, that he knew no persons who were engaged in it. That he had been heard to declare, that Lord Russell had died innocent, and that Algernon Sydney had

met with very hard measure. He observed, that Lord Howard was known to be a scoffer at religion, and an unbeliever in a future state of rewards and punishments: and insisted, that a man of that persuasion, who was unconfirmed, and earned a pardon by his evidence, ought not to have any weight or influence with a jury.

A second counsel for the prisoner rose to P. 1086. make some observations, when the Chief Justice directed him to proceed to the evidence. "I know," said the Chief Justice, "you will expect to be heard at last, and so you shall, whatever you will say."*

Several witnesses were called for the prisoner. One stated, that Lord Howard, in speaking to him of an insurrection, which was rumoured abroad, had protested to God, that he knew nothing of it, and he was sure that Algernon Sydney also knew nothing of it. Another witness stated, he heard Lord How- P. 1087. ard say, when Lord Russell was taken up, that he feared it was a sham plot, and that he denied all knowledge of a plot in the most

* The Chief Justice evidently considered it to be the regular practice, that the second counsel should address the jury at the close of the evidence, rather than before the evidence, on this trial for a misdemeanor. This is the established practice in trials for high treason.

P. 1090. **positive manner.** A third said, he had heard Lord Howard assert Sydney's innocence, and that he mentioned nothing respecting the prisoner.

P. 1091. Doctor Burnet said, that Lord Howard told him, the day after the rumoured discovery of a plot, that it was a mere contrivance, and that he knew nothing of it, and believed it not. Another witness proved, that Lord Howard, speaking of a promise of a pardon to him, said, that he had a warrant for a pardon, but not the pardon itself, and should not have it, till the drudgery of swearing was

P. 1095. over. Several witnesses spoke highly of the character of Hampden, describing him as a man of strict honor and integrity, disposed to study and a contemplative life, and averse to noise and turbulence.

Sir Henry Hobart was one of those called to speak to his character, and objected to by the Attorney-General, on the ground of his being bail for the appearance of the prisoner. The Lord Chief Justice held it to be clear and established law, that he was an incompetent witness.—It is certain, however, that there was no legal objection to his competency. In a *civil* cause, indeed, the bail of the defendant are interested, as they may be made responsible to the costs of the suit; but the objection does

not apply to *criminal* prosecutions. The Attorney-General afterwards waved the objection.

This witness spoke of Hampden's attachment to the government, and his respect for the King. One or two others gave similar evidence.

The counsel then called a witness, to give P. 1099. an account of Lord Howard's opinions, as to a future state of rewards and punishments, and a future world. The Lord Chief Justice objected to this course.

L. C. J. Pray take notice of this. Private P. 1103. discourses, that people cannot come to make answer unto, because they cannot imagine to have them objected, are a very odd sort of evidence.

Counsel. Therefore I opened it warily and tenderly. My Lord, the witness will tell you the story better than I.

L. C. J. I cannot tell, what the witness has said, or I have said, in heat of talk or vanity. God knows, how often all of us have taken the great name of God in vain ; or have said more than becomes us, and talked of things we should not do.

Att. Gen. My Lord, how can my Lord Howard be prepared to give any answer to this ?

Lord Howard. My Lord, this presses hard upon my reputation. I profess, before God, I do not know this fellow. I never saw him in my life before, as I know : but a company of impudent fellows take the liberty of saying what they please.

L. C. J. To rake into the whole course of a man's life, is very hard.

Lord Howard. I would fain have these fellows dare to say this any where else of me.

Counsel. Well, my Lord, we will wave it.

L. C. J. They do not think it a fit thing to press it.

Lord Howard. But, my Lord, it concerns me in my reputation. Who is this rascal, they bring here? God's life, who is he?

P. 1103. L. C. J. We must be tender of men's reputation, and not let every thing come as evidence, when it is not fit to be evidence, to put slurs and scandals upon men, that they cannot be prepared to wipe off. Is he convicted of any crime? If he is, you say something; show the record of it.

Justice Withens. You know the case adjudged lately in this court. A person was indicted for forgery; we could not let them give evidence of any other forgeries, but that for which he was indicted; because we would

not suffer any raking into men's course of life, to pick up evidence, that they cannot be prepared to answer.

The counsel for the prisoner waving all observations upon the evidence, and the counsel for the crown waving the reply, the Lord Chief Justice summed up the case to the jury. In the course of his summing up, he observed, (assuming the plot as a notorious and well-established fact,) "All men know, in the plot there were several parts : there was the business of Keeling and West, and that was the assassination of the King and the Duke. But the Duke of Monmouth, Lord Howard, and these other gentlemen, were for the business of the rising, though that might be in order to effect that other purpose." In another passage, he said, "The same evidence, which made the Duke of Monmouth fly, and Lord Essex cut his own throat, convicted Lord Russell and Colonel Sydney, and is now brought against the defendant, and has, from time to time, been given against the rest." [NOTE D.]

He concluded with these words : "Here is a matter of great concern and consequence ; a matter, wherein the peace of the government and the kingdom is concerned

in a very high degree; a matter that, if there were another witness as positive against the defendant as my Lord Howard, would amount to no less than high treason. But as there is but one witness, backed with these circumstances to corroborate his testimony, it is not only a trespass; but, I tell you, it treads very nigh upon high treason, and the tendency of it was to bring us all into confusion. And what would be the consequence of that, but to lay us open to the same mischiefs, that we were under in the times of the late rebellion? For though men pretend never so fair, and veil it under the names of security of the government and the Protestant religion; yet they would have done well to have tarried, until they had a legal authority to call them to consult of these high matters, that they pretend to secure."

P. 1123. The jury retired, and in half an hour returned with a verdict of guilty. On the 12th of February following, Hampden was brought to the bar, to receive the sentence of the Court. The Attorney-General prayed, that the Court would set a good fine upon him, and that he should find sureties for good be-

P. 1124. haviour during his life. His counsel stated, that although he had a prospect of a large

estate, as heir apparent to his father, yet he had but little in possession ; and they submitted this to the consideration of the Court. The judge, who passed the sentence, observed, that they did not take cognizance of his estate, although it had been understood, that there was a great estate in his family. The sentence of the Court was, that the prisoner should pay a fine of forty thousand pounds to the King, find sureties for good behaviour during his life, and be committed till he should pay the fine.

There is little to observe upon this case. Remarks.
The summing up of the Chief Justice was, as usual, unfair in the extreme. But it cannot be doubted, that there was, on the part of the prosecution, legal and competent evidence, in support of the indictment ; and no great effort appears to have been made in the defence, to repel the charge, or to expose the principal witness, Lord Howard. To abstain altogether from the cross-examination of such a questionable witness, and suffer him to pass off the boards untouched, was a signal omission in the conduct of the defence. Seldom had a witness been placed in so degraded a situation as Lord Howard, who, to save himself, betrayed and sacrificed his nearest associates ;

and, at the very moment that he was straining his evidence against them, assumed the tone of a man of fine honor and sentiment. Such meanness and hypocrisy might have been severely and justly exposed by an able cross-examination. He might have been questioned with success, respecting his declarations as to the innocence of Lord Russell and Sydney, his repeated statements as to his own ignorance of the conspiracy, his large share of guilt in the Rye-house Plot, and the contradictory accounts which he had given in the former trials. From the want of a cross-examination of this kind, the speech in defence fell cold and flat. The evidence was consequently introduced without expectation or effect, and produced little or no impression upon the jury.

It appears, from an examination of Hampden, before a committee of the House of Lords, soon after the revolution*, that upon his receiving the sentence of the court, he was committed to the Marshal's House in the King's Bench, where he continued for ten months; that he was then removed into the

* See 9 Howell, p. 959.

common prison, where he was kept in close custody for ten or eleven months ; during which time, the whole of his real and personal estate was seized. He was then sent a close prisoner to the Tower, under a warrant from Lord Sunderland ; and two of the rudest warders in the Tower were lodged in the same room with him as guards. After seven or eight weeks of this treatment, he was removed to Newgate, where he was kept close for eleven weeks. His friends offered six thousand pounds for his pardon, through Lord Jefferies, which sum, at last, was accepted, though in the first instance a pardon had been offered for half that sum, on condition of his pleading guilty to the indictment.

Hampden, having been thus convicted of a misdemeanor for a conspiracy, and sentenced to pay a grievous fine, was in the following year arraigned on a charge of high treason.* The overt acts laid in the second indictment were said to have been committed in the same year,

Trial for
High Treason.

* The trial of John Hampden at the Old Bailey, for high treason, 1 James II., 1685. 11 Howell, 479.

and about the same time, as the overt acts contained in the indictment, on which he had been tried for the misdemeanor. In the former case, the overt acts were charged, as overt acts of a seditious intent to disturb the peace of the kingdom, and alienate the affections of the people; in this, they were laid as overt acts of high treason in compassing and in imagining the death of the King. The indictment having been read over to the prisoner, he submitted to the court, that he was indicted for a fact, for which he had been before tried and convicted, and for which he was now suffering imprisonment, in execution of the fine that had been imposed by the judgment of the court. To be twice tried, twice convicted, and twice punished for one and the same fact, (he said,) would be a very extraordinary proceeding. "But," added the prisoner in conclusion, "I pass by all pleas whatever, and cast myself wholly upon the King's mercy: that is my resolution."

¹¹ Howell,
p. 482.

"Were you ever tried before," said the Chief Justice Jefferies, "for high treason? The very punishment, which you allege to have been inflicted, is a plain proof, that you were not tried for high treason; for that is

not usually punished by fine and imprisonment." The prisoner submitted, that the fact was the same. "You must plead directly; say, you are guilty, or not guilty," replied the Chief Justice. Upon this, the prisoner pleaded guilty, and made an abject submission; declaring, that his offence against the King was very great, that he was very sorrowful for it; that the King was an inexhaustible fountain of mercy as well as justice; and could he be so happy as to obtain his Lordship's intercession with his Majesty on his behalf, he doubted not, but that the same grace and goodness, which had been granted to others, might be extended to him. The Chief Justice referred him to that fountain of mercy. "But I humbly beg," said Hampden, "your Lordship's intercession. I know none can do it better than your Lordship." "Record the plea," said Jefferies. The prisoner again prayed for the intercession of the judge; promising, that if he would be pleased to represent his past sufferings, and his present sorrow for his offence, and to move for a gracious pardon in his behalf, it should be the endeavour of all his life to behave himself as dutiful and as loyal a subject, as any in the King's dominions. The sentence

for high treason was delivered by the Recorder, Sir Thomas Jenner.

Whatever might be the motive for this prosecution — whether to crush opposition among the leaders of the country-party, or to take vengeance upon them for the part which they had taken in the proceedings on the Bill of Exclusion — all moderate men must agree in reprobating a second trial of the prisoner, for the same offence of which he had been before convicted. That he was tried twice for the same offence, cannot be doubted; though, in strictness, he could not have pleaded the former conviction in bar of the second prosecution. The Attorney General on the former occasion professed, that the crown directed a trial for the *misdemeanor*, out of pure mercy, in order to give the prisoner the benefit of counsel; — a declaration, which would have appeared more credible, if the crown had been at that time in possession of sufficient evidence, to reach him on a charge of *treason*. If the pretended motive of mercy was the real one, for the course adopted in the first instance, it is difficult to suggest any excuse for trying the prisoner a second time, for treason, upon the same overt acts. The true explanation of the trial for the misdemeanor, is to be found in

the fact, that at that time the crown had only a single witness, Lord Howard, to prove the meetings at Hampden's and Lord Russell's; and the circumstance, that a second witness was afterwards procured, in the person of Lord Grey, will account for the charge of high treason.

NOTES.

NOTE A. p. 120.

EVELYN, in his Journal, writes: "The Duke of Monmouth, now having his pardon, refuses to acknowledge there was any treasonable plot; for which he is banished Whitehall. There was a great disappointment to some, who had prosecuted Trenchard, Hampden, and others, who for want of a second witness were come out of the Tower upon their *Habeas Corpus*." Evelyn's Memoirs, vol. i. p. 531.

NOTE B. p. 123.

The challenge to the juror, in this case, (which was a *principal* challenge,) on the ground of his holding an office under the Crown, appears to have been properly overruled. Lord Hale says expressly, that it is not a principal challenge, that the juror is of the King's livery. (2 Hale, p. C. 271.) And in the case of Sir W. Parkyns, on a trial for high treason, Lord Chief Justice Holt expressed his opinion, that this was not a sufficient cause of challenge. 13 Howell, p. 75. See also Co. Litt. p. 156. a.

NOTE C. p. 129.

The Chief Justice three times pressed the witness's memory, as to the person, who spoke first; doubtless, well remembering the evidence, which Lord Howard had given on the trial of Sydney. It is remarkable, how the witness varied in his statements. In Sydney's case, he said, "Mr. Hampden, I suppose, did think it most properly belonging to him to take upon him the part, as it were, to open the Sessions, that was, to give us a little account of the reason, end, and intention of the meeting; in which discourse he took occasion to recapitulate some design, that had been before chiefly carried on by Shaftsbury, before this time dead; and also took notice of the ready disposition and inclination of the minds of men to go on with it; and did give one instance of his judgment of it, that it being a design communicated to so many, it had not been so much as revealed, or a murmur or whisper gone about it: from whence he took occasion to tell us, that it was absolutely necessary for the future, there should be some council, that should be as a spring, a little to guide and govern the motions of the rest; for that there were divers things to be taken care of, which, if not taken care of by particular persons, would all miscarry. This was the substance of the prologue and introduction, which he made. Hence he made a transition to some particular things, which he thought were principally to be taken care of." See 9 Howell, p. 850.

NOTE D. p. 141.

The question, whether Lord Essex destroyed him-

self, or was murdered in the Tower, is discussed at length in a note in Harris's Life of Charles II. See also the trial of Braddon and Speke, who were tried for suborning witnesses, to prove that the Earl of Essex was murdered by his keepers. See 9 Howell, p. 1127. See also Evelyn's Memoirs, vol. i. p. 555.

PROCEEDINGS AGAINST
SIR THOMAS ARMSTRONG,
IN THE KING'S BENCH,
UPON AN OUTLAWRY,
FOR HIGH TREASON,

36 Cha. II. 1684.—10 *Howell*, 106.

SIR THOMAS ARMSTRONG has been already mentioned, as one of the party assembled at the house of Sheppard. As soon as the government obtained information of this meeting, he fled beyond the sea to the States of Holland. A bill of indictment was without delay presented against him; upon which he was prosecuted to outlawry. Shortly afterwards he was discovered, and apprehended at Leyden under a warrant, which the English Envoy had obtained from the States.

On the 10th of June 1684, Sir Thomas P. 109.
Armstrong was committed to Newgate; and on the 14th was brought to the bar of the Court of King's Bench, before Chief

Justice Jefferies, and the three judges, Withens, Holloway, and Walcott. The Attorney General, Sir Robert Sawyer, prayed of the Court an award of execution against him, upon the outlawry. "Arraign him upon the outlawry," said the Chief Justice Jefferies. He was then arraigned; and asked the usual question — "What he had to say for himself, why execution should not be awarded against him upon his attainder?" The prisoner submitted, that he was beyond the sea at the time of the outlawry: and prayed, that he might be tried. The Chief Justice answered, that the Court had nothing to do upon the record before them, but to award execution. Then, turning to the keeper of Newgate, "Captain Richardson," said he, "which are your usual days of execution?"

The daughter of the prisoner, who attended her father in court, here addressed the Court, pointing out a statute. "There is a statute," said the prisoner, "made in the sixth year of Edw. VI., which I desire may be read." "For what purpose would you have it read?" said the Chief Justice. "It giveth the person outlawed for high treason," replied the prisoner, "a year's time, to reverse the outlawry, if he were beyond sea. I desire it may be

read." "Aye," said the Chief Justice, "let it be read. Sir Thomas will not find it to his purpose."

The statute of 5 & 6 Edw. VI. c. 11. was read. The seventh section enacts, that all process of outlawry against any offenders in treason being resiant or inhabitant out of the limits of this realm, or in any parts beyond the sea, at the time of the outlawry pronounced against him, shall be as good and effectual in the law, to all intents and purposes, as if any such offenders had been resiant and dwelling within the realm at the time of such process awarded and outlawry pronounced.

The eighth section provides, that if the party outlawed shall, within one year next after the said outlawry pronounced, or judgment given upon the said outlawry, yield himself to the Chief Justice of England for the time being, and offer to traverse the indictment or appeal, whereupon the said outlawry shall be pronounced, that then he shall be received to the said traverse, and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry, and of all penalties and forfeitures by reason of the same, in as large and ample manner and form as though no such outlawry had been made.

P. 111. The statute having been read, the Attorney General said, "I suppose, Sir Thomas now will show, that he yielded himself to your Lordship:" on which the Chief Justice remarked, that this was the first time he had ever seen the prisoner. "My Lord," answered the prisoner, "I have been a prisoner, and the year is not yet out. I now render myself." "Before he went out of England," remarked the Attorney General, "he might have rendered himself and been tried, if he pleased." The prisoner still insisted, that the statute was plain, and applied to his case. But the Chief Justice and the rest of the Court held, that since he had been brought to the bar as a prisoner, and had not rendered himself, he was not entitled to the benefit of the act. The prisoner requested, that he might have counsel assigned, to argue this point of law. This was peremptorily refused. "Methinks," said the prisoner again, "methinks, my Lord, the statute is plain." "So it is," answered the Chief Justice, "very plain, that you have no advantage by it." Then, turning to the keeper of Newgate, "Captain Richardson," said he, "you shall have a rule for execution on Friday next."

The prisoner entreated to be allowed to

· speak. "I would only take notice of one P. 115. thing, my Lord. May I speak?"

L. C. J. Aye, Sir Thomas, very freely, what you please.

Sir Thomas Armstrong. A little while ago there was one in this place, who had the benefit of a trial offered him, if he would accept of it. That is the thing I desire now, and I thank God, my case is quite another thing than his. I know my own innocence; and I desire to make it appear by a trial.

L. C. J. Sir Thomas Armstrong, you may go away with what opinion you please of your own innocency: but you are here attainted by outlawry. That which was done to him whom you speak of, was the grace and mercy of the King, and he may, if he please, extend the same grace and favour to you. But that is not our business: we are satisfied that, according to law, we must award execution upon this outlawry.

"My Lord," exclaimed the prisoner's daughter, "I hope you will not murder my father. This is murdering a man."

L. C. J. Who is this woman? Marshal, take her into custody. Why, how now? Because your relation is attainted for high treason, must you take upon you to tax a

Court of justice for murder, when we grant the execution according to law? Take her away."

"God Almighty's judgments light upon you!" exclaimed the daughter.

L. C. J. God Almighty's judgments will light upon those, that are guilty of high treason.

"Amen, I pray God!" — said she.

L. C. J. So say I. But clamours never prevail at all upon me. I thank God, I am clamour-proof, and will never fear to do my duty.

P. 114. The Attorney General here proceeded to enter upon some particulars of the evidence, which, he said, would have been brought forward against the prisoner, if he had been tried before outlawry; upon which, he was stopped by the Chief Justice. "We are not," said he, "to meddle at all with the evidence, Mr. Attorney; that is not our business: here is an outlawry; upon this outlawry he is attainted; we have nothing more to do, but to do the duty of the Court upon this record before us, to award the execution upon that attainder; and we must give a rule for it. If the King will be pleased to do for Sir Thomas Armstrong what he did for Holloway, and indulge him with a

trial, and wave the outlawry, with all our hearts. We are not disposers of his grace and favour, but the ministers of his justice. If the King will pardon him, he may ; that is not our business ; but all we have to do upon what is before us, is to consider the record, and what the prisoner says against awarding of execution. We have considered, whether this be a yielding within the proviso of this statute ; and we think it is not, nor can be by any means."

The prisoner still submitted to the Court, that his case was within the meaning of the statute. "I ought," said he, "to have the benefit of the law, and I demand no more." "That you shall have, by the grace of God," retorted Jefferies ; and, turning to the keeper of Newgate, added, "See that execution be done on Friday next, according to law." Then addressing himself to the prisoner — "You shall have the full benefit of the law."

The prisoner was immediately led from the bar, and the execution took place at the appointed time. The sentence was executed with the utmost rigour.* [NOTE A.]

These proceedings, in a small compass, ex-

* Burnet, Hist. vol ii. 196.

hibit great injustice and inhumanity. The same point which occurred here, occurred again in the year 1729; when the Court of King's Bench were clearly of opinion, that the prisoner, though brought up in custody and not on a voluntary surrender, was yet entitled to traverse the outlawry within the year, and to have the benefit of a trial.*
[NOTE B.]

* Case of Johnson, 2 Str. 824. Foster, C.L. p. 46.

NOTES.

NOTE A. p. 159.

IN the Convention Parliament, the House of Commons resolved unanimously,—1st. That Sir Thomas Armstrong's plea on the stat. of 5 Edw.6. ought to have been admitted; and that the execution, upon the attainder by outlawry, was illegal, and a murder under the pretence of law: 2dly, That the executors and heirs of Sir Thomas Armstrong ought to have reparation of their losses out of the estates of the four judges and the two prosecutors: 3dly, That a writ of error, for the reversal of a judgment in felony or treason, is the right of the subject, and ought to be granted at his desire, and is not an act of grace or favour, which may be denied or granted at pleasure. (See Parl. Deb. 19 Nov. 1689.) Not long after this, the conduct of Sir Robert Sawyer, for his share in this illegal affair, was arraigned in the House of Commons. He urged, in his defence, that it was his duty to demand judgment of the outlawry; that he had not entered into any argument, to incline the

Court either the one way or the other; and that no honest man could serve the Crown, if he must be blamed for all the miscarriages of the judges. The result of the debate was a resolution to expel him from the House, as one of the prosecutors of Sir Thomas Armstrong. (See Parl. Deb. 18 Jan. 1689.)

The attainder of Sir Thomas Armstrong was afterwards reversed, on a writ of error in the King's Bench. (4 Mod. Rep. 366.)

NOTE B. p. 160.

For the purpose of illustrating the character of the Chief Justice Jefferies, I cannot help referring to a public address, delivered by him, when he was afterwards Lord Chancellor, on the appointment of Sir Edward Herbert to the office of Lord Chief Justice of the Court of King's Bench, in 1685. After exhorting the new Chief Justice to be undaunted and courageous, the Lord Chancellor concluded with these words:—"Be sure to execute the law to the utmost of its vengeance upon those that are now known, and we have reason to remember them, by the name of Whigs. And you are likewise to remember the snivelling Trimmers." — (See Collect. Jurid., vol. ii. 405.)

The horror which the Lord Chancellor Jefferies felt at the sight of a Trimmer, is pleasantly described by Roger North:—It happened that a scrivener of Wapping, appealed to the Chancellor for relief against a bond; on which, the counsel for the opposite party remarked, that the appellant was a strange fellow, and in the habit of going sometimes to

the church, sometimes to conventicles; and that he was suspected of being a Trimmer. The Chancellor instantly fired at the word: 'A Trimmer!' said he: 'I have heard much of that monster; but never saw one. Come forth, Mr. Trimmer, turn you round, and let us see your shape.' This so frightened the scrivener, that he almost dropped. At the conclusion of the business, on being asked by one of his friends, how he came off? — 'Came off,' he answered, 'I am escaped from the terrors of that man's face, which I would scarce undergo again, to save my life; and I shall certainly have the frightful impression of it as long as I live.' Afterwards, (as the story continues,) when the Prince of Orange landed, and all was in confusion, the Lord Chancellor disguised himself, in the hope of escaping beyond the sea. He was dressed like a seaman, and drinking in a cellar. The scrivener happened to enter at this time, looking after a client, and his eye caught the impression of that face, which made him start. The Chancellor seeing himself eyed, pretended a laugh, and turned to the wall with his cup in his hand. The Trimmer instantly went out, and gave notice, that the Chancellor was there; upon which the mob flowed in, and he was in extreme hazard of his life; but at last he was with great difficulty saved by the interference of the Lord Mayor. — (See *Life of Lord Keeper Guildford*, vol. ii. p. 118.)

Sir George Jefferies died in the Tower, in the spring of the following year. It appears from the Parliamentary Debates, that the violent conduct of this man was the subject of a debate in the House of Commons on the 6th day of November, 1689,

when it was declared, that the estates and honours of the Chancellor had been the price of the people's blood; and the House resolved unanimously, that a bill should be brought in, to create a forfeiture of those estates and honours. No further trace of this bill appears.

THE TRIAL
OF
LADY ALICIA LISLE,
AT WINCHESTER,
FOR
HIGH TREASON.

1 James II. 1685.— 11 *Howell*, 298.

THE trial of Lady Alicia Lisle was one of those cruel proceedings, which marked the memorable expedition of the Lord Chief Justice Jefferies into the west, after the battle of Sedgmoor. The Duke of Monmouth's army had been completely dispersed. Monmouth himself was taken, and put to death: the country had been ravaged by soldiers, and military executions inflicted without mercy. "And now," (to use the language of Hume,) "the violent Jefferies, as if resolved to show the people, that the rigours of law might equal, if not exceed, the ravages of military tyranny, set out, with a savage

joy, as to a full harvest of death and destruction.”

The commission was opened at Winchester, where the trial of Lady Lisle took place, on the 27th August, 1685. She was the widow of John Lisle, who had been one of the council of state in the time of the Commonwealth, and who had assisted the Lord President in the High Court of Justice, appointed for the trial of Charles I., but he was not one of those who signed the warrant for the King's death. It is not improbable, that the name of the prisoner, and still more her alliance with one who had espoused the cause of the Commonwealth, might excite a feeling of hostility against her, in so furious a zealot as Jefferies. It is certain, that he treated her with extreme rigour; and if proofs were wanted of the cruelty of his nature, they might be supplied in abundance from the report of this interesting trial. [NOTE A.]

P. 299. The charge against the prisoner was, that, intending to stir up war and rebellion within the kingdom, and to deprive the King of his crown, and to put him to death, she had traitorously concealed, sheltered, and maintained in her dwelling-house, at the parish of Ellingham, one John Hicks, knowing him at

the time to be a traitor, and to have traitorously imagined the death of the King, and to have levied war against the King.

The prisoner, having pleaded to this charge, begged the Judge, in consideration of her age and infirmities, (for she was above seventy years of age, and could not hear without difficulty,) that some friend might stand by her side, to inform her of what passed at the trial. This was granted. The jurors were then called over. The report mentions, that the Lord Chief Justice had given particular directions to the Sheriff, to take care that a very substantial jury should be returned, as the cause was one of great expectation and moment.

Pollexfen stated the case on the part of the crown. He described the prisoner as the widow of John Lisle, a person in his life-time sufficiently known; and represented Hicks to be the chief instrument in Monmouth's rebellion. The prisoner here declared, she utterly abhorred that rebellion. "Look you," said Jefferies, "I must interrupt you. You shall be fully heard, when it comes to your turn to make your defence, but any thing you say now, before hand, is altogether irregular and improper. You, it may be, are ignorant of the forms of law, therefore I would inform you. You are first

P. 316.

P. 322.

to hear, what your accusation is ; you shall ask any questions of the witnesses that you will, after the King's counsel have examined them, as they go along ; and when all this testimony is delivered, you shall be heard in making your own defence, and have full scope and liberty to enlarge upon it, as long as you can. It is a business that concerns you in point of life and death ; all that you have, or can value in the world, lies at stake, and God forbid, that you should be hindered, either in time or any thing else, whereby you may defend yourself. But at present it is not your turn to speak, for the forms of law require your accusers first to be heard ; it is absolutely requisite, that the usual forms and methods of law be inviolably observed ; and it does the prisoner no injury, that the law is kept so strictly. We have that charity as well as justice, which it becomes, and it is not below all courts, to have for persons in your condition ; and we are obliged to take care, that you suffer no detriment or injury by any illegal or irregular proceedings. For though we sit here as judges over you, by authority from the King, yet we are accountable, not only to him, but to the King of kings, the great Judge of heaven and earth ;

and therefore we are obliged, both by our oaths, and upon our consciences, to do you justice ; and, by the grace of God, we shall do it, you may depend upon it. And as to what you say concerning yourself, I pray God with all my heart, you may be innocent."

The first witness, Pope, was directed to P. 323. say, what he knew concerning Hicks. He stated, that having been taken prisoner by Monmouth's army, and being under a guard at Keinsham, he saw there a person, known by the name of Hicks, who had a conversation with him and some other prisoners. In the course of the conversation, Hicks called the Duke of Monmouth a good Prince and a Protestant, reflected upon the person of the King and on his government, and expressed his surprise at the conduct of the prisoners in serving a Papist, and not obeying a Protestant Prince. The witness said, he had seen Hicks the day before the trial in Salisbury gaol, and that he was the same person, who passed by that name in the Duke of Monmouth's army at Keinsham ; he had seen him with the army a day or two before the battle.

Two other witnesses, Fitzherbert and Taylor, gave evidence nearly to the same effect. The former said, he had seen Hicks with the

Duke of Monmouth's army, after the time of his conversation with the prisoners: and the latter said, he had seen him afterwards up and down the army.

P. 325. Pollexfen then called a witness of the name of Dunne, for the purpose of proving a message sent to the prisoner on the 26th of July, ten or twelve days after the taking of the Duke of Monmouth. "But," said the King's counsel, "I must acquaint your Lordship, that this fellow, Dunne, is a very unwilling witness; and therefore, with submission, we do humbly desire, that your Lordship would please to examine him a little the more strictly." "You say well," answered the Chief Justice. Then, addressing himself to the witness, "Hark you, friend, I would take notice of something to you by the way, and you would do well to mind what I say to you. According as the counsel, that are here for the King, seem to insinuate, you were employed as a messenger between these persons, one whereof has been already proved a notorious rebel, and the other is the prisoner at the bar; and your errand was, to procure a reception at her house for him."

Dunne. My Lord, I did so.

L. C. J. Very well. Now, mark what

I say to you, friend. I would not, by any means in the world, endeavour to fright you into any thing, or any ways tempt you to tell an untruth, but rather provoke you to tell the truth, and nothing but the truth; that is the business we come about here. Know, friend, there is no religion, that any man can pretend to, can give a countenance to lying, or can dispense with telling the truth. Thou hast a precious immortal soul, and there is nothing in the world equal to it in value. There is no relation to thy mistress, if she be so; no relation to thy friend; nay, to thy father or thy child; nay, not all the temporal relations in the world can be equal to thy precious immortal soul. Consider, that the great God of heaven and earth, before whose tribunal thou, and we, and all persons are to stand at the last day, will call thee to an account for the rescinding of his truth, and will take vengeance on thee for every falsehood thou tellest. I charge thee, therefore, as thou wilt answer it to the Great God, the Judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever: for though it were to save thy life, yet the value of thy precious and immortal soul is much greater,

than that thou should'st forfeit it, for the saving of any the most precious outward blessing thou dost enjoy. For that God of heaven may justly strike thee into eternal flames, and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth, and nothing but the truth. According to the command of that oath that thou hast taken, tell us who employed you, when you were employed, and where? Who caused you to go on this message, and what the message was? For, I tell thee, God is not to be mocked, and thou canst not deceive him, though thou may'st us. But I assure you, if I catch you prevaricating in any the least tittle, (and, perhaps, I know more, than thou thinkest I do,—no, none of your saints can save your soul, nor shall they save your body neither,) I will be sure to punish every variation from the truth, that you are guilty of. Now, come and tell us, how you came to be employed upon such a message, what your errand was, and what was the issue and result of it?

P. 526.

The witness then stated, that on a Friday after the battle at Weston, a person called at his house, and desired him to go with a message to Lady Lisle for one Hicks, promising

that he should be well rewarded for his pains. He accordingly set off for Lady Lisle's house, which was about twenty-six miles distant from his own home. On his arrival he went to her bailiff, whose name was Carpenter, and asked him, whether his Lady would entertain one Hicks? The bailiff said, he would have nothing to do with it, and sent him to his mistress. He then went to Lady Lisle, and asked her, whether she would entertain one Hicks? to which she answered, she did not know but she might. She afterwards said, they might come to her house. The witness returned to his own house, and carried back the answer to the messenger, who had before come to him; which answer was, that they might go to her house on the Tuesday following, that was, two days afterwards, in the evening, and that she would entertain Mr. Hicks.

Q. Did she ask you any questions, whether you knew Mr. Hicks?

Dunne. Nothing at all of that, as I remember.

Q. Did she believe, that you knew Hicks?

Dunne. I cannot tell, my Lord.

Q. Do you believe, that she knew him before?

Dunne. I cannot tell, truly.

L. C. J. Why, dost thou think, she would entertain any one, that she had no knowledge of, merely upon thy message? Mr. Dunne, Mr. Dunne, have a care. It may be, more is known of this matter, than you think.

Dunne. My Lord, I tell you the truth.

L. C. J. Aye, be sure you do, do not let me take you prevaricating.

Dunne. My Lord, I speak nothing but the truth.

L. C. J. Well, I only bid you have a care, truth never wants a subterfuge; it always loves to appear naked, it needs no enamel nor any covering; but lying and snivelling, and canting, and Hicksing, always appear in masquerade. Come, go on with your evidence.

P. 329. The witness then stated, that the person, who had before come to his house, came again with two others, (whose persons the witness described,) early on the Tuesday morning; and in a few hours he set off with these two other men, whom he afterwards knew to be Hicks and Nelthorp. They arrived at Lady Lisle's about nine or ten o'clock that night. Hicks and Nelthorp were led into the house: the horses were put up in the stable; the bailiff fed the witness's horse; and a maid-

servant conducted the witness to a lodging-room for the night.

L. C. J. You say, Carpenter brought the P. 338.
light into the stable, and gave your horse hay ?

Dunne. He did, my Lord.

L. C. J. Now, prithee, tell me truly, where came Carpenter unto you ? I must know the truth of that. Remember I gave you fair warning ; do not tell me a lie, for I will be sure to treasure up every lie that thou tellest me, and thou may'st be certain, it will not be for thy advantage. I would not terrify thee, to make thee say any thing but the truth ; but assure thyself, I never met with a lying, sneaking, canting fellow, but I always treasured up vengeance for him. Therefore, look to it, that thou dost not prevaricate with me ; for be sure, thou wilt come to the worst of it, in the end.

Dunne. My Lord, I will tell the truth, as near as I can.

L. C. J. Then tell me, where Carpenter met thee ?

Dunne. In the court, my Lord.

L. C. J. Now, upon your oath, tell me truly, who it was, that opened the stable-door. Was it Carpenter or you ?

Dunne. It was Carpenter, my Lord.

L. C. J. Why, thou vile wretch, didst not thou tell me just now, that thou pluckedst up the latch? Dost thou take the God of heaven not to be a God of truth, and that he is not a witness of all thou sayest? Dost thou think, because thou prevaricatest with the Court here, thou canst do so with God above, who knows thy thoughts? It is infinite mercy, that, for those falsehoods of thine, he does not immediately strike thee into hell! Jesus God! there is no sort of conversation, nor human society, to be kept with such people as these are, who have no other religion but only in pretence, and no way to uphold themselves but by countenancing lying and villainy! Did you not tell me, that you opened the latch yourself, and that you saw nobody else but a girl? How durst you offer to tell such horrid lies, in the presence of God and of a Court of Justice.

P. 340. L. C. J. Will the prisoner ask this person any questions?

Prisoner. No.

L. C. J. Perhaps, her questions might endanger the coming out of all the truth: and it may be, she is well enough pleased to hear him swear, as he does. But it carries a very foul face, upon my word.

The next witness, Barter, stated that Dunne P. 341. had asked him on the Saturday to ride with him to Moyles Court, where the prisoner lived ; and he accordingly went. While they were there, Lady Lisle went to dinner, and laughed with Dunne, at the same time looking upon the witness. On their return, the witness asked Dunne, what she laughed at ? He answered, that Lady Lisle inquired of him, whether he (Barter) knew any thing of the concern ? to which he replied, that he did not know any thing of it. “ After this,” added the witness, “ I could not eat, nor drink, nor sleep, till I had discovered this to some Justice of the Peace.”

L. C. J. Let my honest man, Mr. Dunne, P. 342. stand forward a little. — Did not you tell him, that you told my Lady, when she asked whether he was acquainted with the concern, that he knew nothing of the business ?

Dunne. My Lord, I did tell him so.

L. C. J. Did you so ? Then you and I must have a little further discourse. Come, now, and tell us, what business was that ? and tell us so, that a man may understand and believe, that thou dost speak truth.

Dunne. Does your Lordship ask, what that business was ?

L. C. J. Yes, it is a plain question. What was that business, that my Lady asked thee, whether the other man knew ; and then you answered her, that he did know nothing of it ? (Upon this, the witness paused awhile.) Remember, friend, thou art upon thy oath ; and remember, withall, that it is not thy life, but thy soul that is now in danger : therefore, I require from thee a plain answer to a very plain question. —What was that business my Lady inquired after, whether the other fellow knew, and thou toldest her, he did not ? (Dunne made no answer, but paused again.) He is studying and musing, said the Chief Justice, how he shall prevaricate. But thou hadst better tell the truth, friend : remember, what thou hast said already. Thou hast said, that thou didst tell that man, that the Lady asked you, whether he knew any thing of the business, and thou toldest her, he did not ? Now, I would know, what that business was ? (Still he made no answer, but seemed to muse.) Look ye, if thou canst not comprehend what I mean, I will repeat it again ; for thou shalt see what countryman I am, by my telling my story over twice : therefore, I ask thee once again. Thou said'st, thy Lady asked thee, whether

he knew of the business ; and thou toldest her, he did. Now let us know, what that business was ?

Dunne. I cannot mind it, my Lord, what it was.

L. C. J. Why, prithee, dost thou think, P. 346. that thou dost her a kindness by this way of proceeding? Sure, thou can'st not think so ; for such a sort of carriage were enough to convict her, if there were nothing else.

Dunne. My Lord, pray ask the question once more over again, and I will tell you.

L. C. J. I will so, and I will ask it with all the calmness, and seriousness, and candour, that I can. If I know my own heart, it is not in my nature to desire the hurt of any body, much less to delight in their eternal perdition. No, it is out of tender compassion to you, that I use all these words. Tell me what the business was, which you told the prisoner, the other man, Barter, did not know ?

Dunne. My Lord, I told her, he knew P. 347. nothing of our coming there.

L. C. J. Nay, nay, that can never be it ; for he came along with thee.

Dunne. He did not know any thing of my coming there, till I met him on the way.

L. C. J. Prithee, mind my question. Sure enough, thou hadst told him, whither thou wert going, or else he could not have been thy guide ; so that he must needs know of thy coming there. But what was the business, that thou toldest her, he did not know ?

Dunne. She asked me, whether I did not know, that Hicks was a nonconformist ?

L. C. J. Did my Lady Lisle ask you that question ?

Dunne. Yes, my Lord. I told her, I did not.

L. C. J. But that is not my question. What was the business, that he did not know ?

Dunne. It was the same thing : whether Mr. Hicks was a nonconformist.

L. C. J. That cannot be all ; there must be something more in it.

Dunne. Yes, my Lord, it is all ; I know nothing more.

L. C. J. What did she say to you, when you told her, he did not know it ?

Dunne. She did not say any thing, my Lord.

L. C. J. Why, dost thou think, that after all this pains that I have been at, to get an answer to my question, that thou canst banter me with such sham stuff as this ? Hold the

candle to his face; — that we may see his brazen face.

Dunne. My Lord, I tell you the truth.

L. C. J. Did she ask, whether that man knew any thing of a question she had asked thee, and that was only of being a nonconformist?

Dunne. Yes, my Lord, that was all.

L. C. J. That is all nonsense. Dost thou imagine, that any man hereabouts is so weak as to believe thee?

Dunne. My Lord, I am so baulked, I do not know what I say myself. Tell me, what you would have me to say, for I am cluttered out of my senses.

Colonel Penruddock stated the information, P. 349. which he had received from Barter, and that in consequence of such information, he took a party of soldiers with him, and beset Lady Lisle's house. He saw there the bailiff, Carpenter, who, on being questioned, whether some strangers had not come over-night, confessed that strangers were in the house, and pointed to that part of the house where Hicks and Dunne were concealed. Colonel Penruddock saw Lady Lisle herself, and charged her with harbouring rebels and entertaining the King's enemies. But she said, she knew

nothing of them. He told her, some other person was hid : and she denied knowing any thing about it. They continued the search and found Nelthorp hid in a hole by the chimney.

P. 352. Carpenter and his wife stated, that Dunne came, to ask whether Lady Lisle would receive Hicks and another, whose name was not mentioned. That they accordingly came, and had victuals by Lady Lisle's order, and lodging in the house ; and that she saw them after they had come.

P. 354. Dunne was called back again. He said, that when he had seen Lady Lisle the first time, and delivered the message respecting Hicks, she asked, whether Hicks had been in the army ? he told her, that he could not tell ; that he did not know, whether he had been in the army.

L. C. J. What discourse had you that night at the table in the room ?

Dunne. I cannot tell what discourse, truly, my Lord, there was.

L. C. J. Was there nothing said, of coming from beyond seas,—who came from thence,—and how they came ? Come, I would have it rather the effect of thy own ingenuity, than lead thee, by any questions that I can propound. Come, tell us what was the discourse ?

Dunne. I do not remember all the discourse.

L. C. J. Prithee, let me ask thee one question, and answer it me fairly. Didst thou hear Nelthorp's name named in the room? P. 355.

Dunne. My Lord, I cannot tell, whether he was called Nelthorp; but it was either Crofts or Nelthorp. I am sure, one of them.

L. C. J. Prithee, be ingenuous, and let us have the truth of it.

Dunne. My Lord, I am ingenuous, and will be so.

L. C. J. I will assure you, Nelthorp told me all the story, before I came out of town.

Dunne. I think, my Lord, he was called Nelthorp in the room, and there was some discourse about him.

L. C. J. Ay, there was unquestionably, and I know thou wert by; and that made me the more concerned, to press upon thee the danger of forswearing thyself.

Dunne. My Lady asked Hicks, who that gentleman was; and he said, it was Nelthorp, as I remember.

L. C. J. Come, I will ask thee a plain question. Was there no discourse there about the battle, and of their being in the army? P. 357.

Dunne. There was some such discourse my Lord.

L. C. J. Ay, prithee, now tell us, what that discourse was?

Dunne. My Lord, I will tell you, when I have recollected it, if you will give me time till to-morrow morning.

L. C. J. Nay, but we cannot stay so long, our business must be dispatched now. What say'st thou? Prithee, tell us what the discourse was?

Dunne. My Lord, they did talk of fighting; but I cannot exactly tell, what the discourse was.

L. C. J. Well, I see thou wilt answer nothing ingenuously. Therefore, I will trouble myself no more with thee.

P. 359. The evidence on the part of the prosecution being closed, the prisoner was called upon for her defence. "Now is your time," said Jeffries, "to make your defence. You hear what is charged upon you, and the kind of shuffling there has been, to stifle the truth. And I am sorry to find the occasion to speak it, that, under the figure and form of religion, such practices should be carried on."

The prisoner in her defence admitted, that she had received Hicks, whom she knew to

be a Presbyterian minister, and against whom a warrant had issued for nonconformity ; but solemnly affirmed, that she had never suspected his being engaged in the late rebellion ; and that the person who accompanied him, was unknown to her even by name.

But I will tell you, (said the Chief Justice, interrupting her,) there is not one of those lying, snivelling, canting, Presbyterian rascals, but one way or other has had a hand in the late horrid conspiracy and rebellion ; — upon my conscience, I believe it — and would have been as deep in the actual rebellion, (had it had any little success,) as that other fellow Hicks. Their principles carry them to it. Presbytery has all manner of villany in it. Nothing but Presbytery could lead that fellow Dunne to tell so many lies, as he has here told. For show me a Presbyterian, and I will engage to show a lying knave.

Lady Lisle. My Lord, I abhorred both the principles and practices of the late rebellion.

L. C. J. I am sure you had great reason for it.

Lady Lisle. Besides, my Lord, I should have been the most ungrateful person living, had I been disloyal, or acted any thing against the present King ; considering how much I was obliged to him for my estate.

L. C. J. Oh then ! Ungrateful !— Ungrateful adds to the load, which was between man and man, and is the basest crime that any one can be guilty of.

Lady Lisle. My Lord, had I been tried in London, I could have had my Lady Abergavenny, and several other persons of quality, that could have testified, how much I was against this rebellion, and with what detestation I spoke against it, during the time of it. I was all that time at London, and staid there, till after the Duke of Monmouth was beheaded ; and if I had certainly known the time of my trial in the country, I could have had the testimony of those persons of honour for me. But, my Lord, I am told, and so I thought it would have been, that I should not have been tried, as a traitor, for harbouring him, till he was convicted of being a traitor. My Lord, I would take my death on it, that I never knew of Nelthorp's coming, nor any thing of his being Nelthorp. I never asked his name, and if he had told it me, I had then remembered the proclamation. I do assure you, my Lord, for my own part, I did abhor those, that were in that horrid plot and conspiracy against the King's life. I know my duty to my King better, and have always

exercised it. I defy any body in the world that ever knew the contrary, to come and give testimony.

L. C. J. Have you any more to say?

Lady Lisle. As to what they say of my denying Nelthorp to be in my house, I was in great consternation and fear of the soldiers, who were very rude and violent, and could not be restrained by their officers from robbery, and from plundering my house. And I beseech your Lordship, to make that construction of it; and I humbly beg of your Lordship, not to harbour an ill opinion of me; because of those false reports, that go about of me, relating to my carriage towards the old King, that I was any ways consenting to the death of King Charles the First. For, my Lord, that is as false, as God is true. My Lord, I was not out of my chamber all the day, in which the King was beheaded, and I believe I shed more tears for him, than any woman then living did; and this the late Countess of Monmouth, and my Lady Marlborough, and my Lord Chancellor Hyde, if they were alive, and twenty persons of the most eminent quality, could witness for me. And I do repeat it, my Lord, as I hope to attain salvation, I never did know Nelthorp, nor ever did see

him before in my life, nor did I know of any body's coming but Hicks. Him I knew to be a nonconformist minister; and there being, as is well known, warrants out to apprehend all nonconformist ministers, I was willing to give him shelter from these warrants.

I never uttered a good word for the rebels, (said the prisoner in conclusion,) nor ever harboured so much as a good wish for them. I know, the King is my Sovereign, and I know my duty to him. If I could have ventured my life, it should have been to serve him; I know it is his due, for to him I owe all I have in the world. But though I could not fight for him myself, my son did. He was in arms on the King's side in this very business. I instructed him always in loyalty; I sent him thither; it was I that bred him up to hazard his life for the King.

P. 362,

The Chief Justice summed up the case to the jury, in a speech abounding with topics calculated to inflame, and containing many exaggerations, with some misrepresentations of the evidence. At the conclusion, he declared, that if the witnesses were worthy of credit, the proofs were as plain as could be given, and as evident as the sun at noon-day.

“And now,” said the Chief Justice to the jury, in language, which from a better Judge, and in a better cause, would have been impressive, “upon your consciences be it. The preservation of the government, the life of the King, the safety and honour of our religion, and the discharge of our consciences as loyal men, good christians, and faithful subjects, are at stake. Neither her age nor her sex are to move you, who have nothing else to consider, but the evidence of the fact you are to try. I charge you, therefore, as you will answer it at the bar of the last judgment, where you and we must all appear, deliver your verdict according to conscience and truth. With that great God, the impartial Judge, there is no such thing as respect of persons; and in our discharge of our duty in Courts of Justice, he has enjoined us, his creatures, that we must have no such thing as a friend in the administration of justice; all our friendship must be to truth, and our care to preserve that inviolate.”

Some of the jury desired to be informed, P.370. whether, in point of law, it would be equally treason, to receive Hicks before conviction, as after?

“It is all the same,” said the Chief Justice;

“for, in case this Hicks had been wounded in the rebel army, and had come to her house, and been there entertained, but had died there of his wounds, and so could never have been convicted, she had been nevertheless a traitor.”

The jury then withdrew, and staid out of court some time, at which the Chief Justice expressed great impatience. “It is surprising,” he said, “that in so plain a case, they should go from the bar.” They returned after half an hour’s consideration, and suggested to the Chief Justice, a doubt which they felt, upon the point, whether there had been sufficient proof, that the prisoner knew Hicks to have been in the army? “There is as full proof, as proof can be,” answered the Chief Justice. “You are the judges of the proof; for my part, I thought there was no difficulty in it.”

P. 572.

Foreman. My Lord, we are in some doubt of it.

L. C. J. I cannot help your doubts. Was there not proved a discourse of the battle, and of the army, at supper-time?

Foreman. But, my Lord, we are not satisfied, that she had notice that Hicks was in the army.

L. C. J. I cannot tell what would satisfy

you. Did she not enquire of Dunne, whether Hicks had been in the army? And when he told her, that he did not know, she did not say, that she would refuse him if he had been there, but ordered him to come by night, by which it is evident she suspected it; and when he and Nelthorp came, she discoursed with them about the battle and the army. Come, come, gentlemen, it is a plain proof.

Foreman. My Lord, we do not remember that it was proved, that she did ask such question, when they were there.

L. C. J. Sure, you do not remember any thing that has passed. Did not Dunne tell you, there was such discourse, and she was by, and Nelthorp's name was named? But, if there was no such proof, the circumstance and management of the thing is as full a proof as can be. I wonder what it is you doubt of?

The jury at length gave way; and the prisoner's life was sacrificed. When the verdict was declared, the Chief Justice addressed the jury in these words:—"I did not think, I should have had any occasion to speak after your verdict, but finding some hesitancy and doubt among you, I cannot but say, I wonder it should come about. For, I think, in my conscience, the evidence was as full and plain as could be, and if I had been among you, and

she had been my own mother, I should have found her guilty."

P. 374. The Chief Justice pronounced judgment on Lady Lisle, and on the prisoners who were afterwards tried, in his own peculiar style of personal rancour and vulgar abuse. He launched out against the Presbyterians, whom he stigmatized as a herd of canting, whining fanatics. Lady Lisle's religion—she was a woman of unaffected piety, and now about to suffer for an act of mere charity—he called deceit and hypocrisy. To some of the witnesses he broadly imputed the crime of perjury. He accused the prisoner of making false protestations of innocence, and after pronouncing an eulogy on his own true christian charity, assured her of his tender regard for her eternal welfare.

After delivering the sentence of death, the Chief Justice informed the prisoner, that the King had left the time of the execution entirely to his discretion, and that whenever he found a convict obstinate, he was at liberty to order execution at any moment. Then, addressing himself to the sheriff, he directed him, to prepare for the execution of Lady Lisle in the course of that afternoon. At the same time, he intimated to the prisoner, that if she would make a full confession within one or two

hours, the execution might possibly be deferred. This attempt to work upon her fears had no effect: she had nothing to confess. Her friends did not fail to exert themselves in her behalf. Lady St. John, and Lady Abergavenny, addressed a letter to one of the ministers in attendance on the King, expressing their high opinion of her loyalty, and particularly noticing some favours, which she had conferred on the King's friends during the time of the rebellion. This letter was read to the King; and his answer was, that he would do nothing in the business, having left it altogether in the hands of the Lord Chief Justice. The prisoner herself petitioned the King, that the execution might be respited for four days, and that the sentence might be altered to beheading instead of burning. The King answered, that he would not reprieve her for a single day, but that he was willing to alter the sentence.

The King persisted in his resolution of not P. 579.
granting a reprieve. Lady Lisle was beheaded on a scaffold, erected in the market-place at Winchester, on the 2d day of September, 1685.; and died with the resolution, which became her rank and her principles. A paper, which she delivered to the sheriff at the time

of her death, contained the following passage :
“ I am told, if I had not denied that the men were in the house, it would not have affected me. I have no other excuse for this denial, but surprize and fear ; which, I believe, my jury must make use of, to excuse their verdict to the world. I have been told, the Court ought to be counsel for the prisoner ; instead of which, there was evidence given from thence ; which, though it were but hearsay, might possibly affect the jury. My defence was such as might be expected from a weak woman ; but, such as it was, I did not hear it repeated again to the jury. But I forgive all persons, who have done me wrong, and I desire that God will do so likewise. I forgive him, who desired to be taken from the grand jury to the petty jury, that he might be the more nearly concerned in my death.”

The attainder of Lady Lisle was reversed in the first year after the Revolution. The bill stated, as the grounds of reversal, that Hicks had not, at the time of Lady Lisle's trial, been attainted or convicted of treason ; and that the verdict had been injuriously extorted and procured by the menaces, violence, and illegal practices of the Chief Justice Jefferies.

Remarks. A very few remarks are necessary at the

close of this trial. It appears from the indictment, before stated, that the facts, which ought to have been established in support of the charge, were the following: First, that Hicks had been guilty of high treason in levying war; secondly, that the prisoner knew of his treason; and thirdly, that, with full knowledge of his guilt, she received and sheltered him. Of her having received Hicks, there could be no doubt; for two witnesses proved, that he was found, with two other persons, concealed at Moyles Court, the prisoner's mansion-house; and another witness, of the name of Dunne, proved, that Hicks came to her house, in the evening before the discovery, with her consent, and by her direction. So far, the case was plain, and free from all doubt.

With regard to the alleged guilt of Hicks, the proof was undoubtedly defective and insufficient. It has been clearly shown by Mr. Justice Foster, that his guilt could only be legally established by formal proof of his conviction; whereas, at the time of this trial, he had not been convicted or tried; but was confined in Salisbury Gaol, and still amenable to justice. The rule, in such cases, is, that if a person is indicted by a *several* indictment,

for receiving and harbouring a traitor, he shall not be tried, till the principal be convicted; if he is indicted in the *same* indictment with the principal, the jury must be charged to inquire, first, of the principal offender, and, if they find him guilty, then of the fact of having received him. For though, in the eye of the law, they are both principals in treason, yet in truth the receiver is so far an accessory, that he cannot be guilty, if the principal be innocent.*

The evidence, as to the alleged treason of Hicks in *levying of war*, was of the weakest and most trifling description. It amounted only to this : — that Hicks had been seen by three of the witnesses, at Keinsham, with Monmouth's army, a day or two before the battle; that, in talking with some of the witnesses, who had been taken prisoners, he expressed his surprise at their bearing arms against the Duke of Monmouth, whom he praised as a kind Prince and good Protestant; at the same time, speaking in disparagement of the King and of his government. This was the substance of the evidence, given by the three first witnesses, all of whom spoke of the same transaction : and

* See Foster's Disc. p. 345. 1 Hale, P. C. 238. 2 Hale, 222.

such evidence was too vague and general, to be considered sufficient proof of his being engaged in the levying of war. There was no distinct evidence of his having joined in any act of rebellion, or of his having done any thing to promote the designs of the rebels, or of his giving them any assistance or support. Nor was it proved, that he appeared in arms; on the contrary, one of the witnesses, on being asked, whether Hicks had a weapon, said, he thought he had not. The mere fact, of his having been seen on one occasion with Monmouth's army, or as one of the witnesses said, "up and down Monmouth's army," amounted to little or nothing, without some fuller explanation of the manner, in which he was then employed, or of the part which he took in its movements. The language, used by him, reflecting on the King and the government, though expressive of disloyalty, and very suspicious in his situation, was not an overt act of high treason. The proof, therefore, of Hicks having levied war, altogether failed. It follows, that the charge against the prisoner, of receiving a person guilty of high treason, also failed; and, on this ground, as well as on that before-mentioned, the prisoner ought to have been acquitted.

But the principal part of the charge, and which, indeed, involved the whole of the prisoner's guilt, was the fact of *knowingly and traitorously* receiving and harbouring Hicks, that is, with full knowledge of his treason ; and, here, the proof failed more signally, than in any other part of the case. It is not too much to assert, that there was nothing which bore even the semblance of proof upon this point. The consent of Lady Lisle, the application to her for her consent, and all the circumstances attending the transaction, were proved by Dunne. This person was introduced by Pollexfen, the counsel for the prosecution, as a very unwilling witness, and the Chief Justice was requested, on this account, to examine him with strictness ; upon which he commenced with a lecture on the obligation of an oath, and concluded with this menace : " I assure you, if I catch you prevaricating in any the least tittle, (and, perhaps, I know more than you think I do ; no, none of your saints can save your soul, nor shall they save your body,) I will be sure to punish every variation from the truth, that you are guilty of." A long examination, or, rather, a very strict cross-examination by the Chief Justice then commenced ; which was conducted by him with

great acuteness and power, but also with extreme roughness and severity. He spared not any art of persuasion or intimidation, to draw from the witness some statement fatal to the prisoner; at one time, using terms of affected concern and compassion; at another time, insulting him in language the most offensive, ridiculing his person, his manners, and his religious tenets, charging him with corrupt perjury, pouring forth imprecations upon his head, and threatening him with vengeance: till at length, the wretched man, bewildered and alarmed, declared, "he was so baulked, that he knew not what he said," adding, in words expressive of his utter helplessness, "I am cluttered out of my senses; tell me, my lord, what you would have me say." Such treatment had the effect which might be expected. The witness wavered in his evidence, and betrayed some inconsistencies; but these of a kind, much more naturally to be explained, as the effect of intimidation, than as arising from any motive of favour to the prisoner, with whom he did not appear to have been connected, or even personally acquainted.

The account given by this witness, was, that he had been desired by some person to go over to Lady Lisle, and enquire of her, whe-

ther she would entertain Hicks. The witness accordingly went to Moyles Court, and made the application to her. She consented, and appointed the time for his coming; and the witness conducted him to her house, in company with another man, at the appointed time. They were concealed there, and the next day discovered, on a search made by a neighbouring magistrate. The witness was much questioned upon the point, whether Lady Lisle asked him, if he knew Hicks: he answered, that he remembered nothing of that. He was then asked, whether *she believed*, that he knew Hicks: this he could not tell. Then he was questioned, whether *he believed* that Lady Lisle knew him before: this also, he was unable to answer. It appeared, further, that in the course of the evening, when the witness, with Hicks and the third person, were sitting together in the prisoner's house, there was some discourse respecting the recent battle; but the particulars of the conversation the witness did not remember; nor was it proved, that Lady Lisle was present, when this conversation occurred.

It is remarkable, that Lady Lisle's bailiff, who was one of the witnesses, and who, from having admitted the party into the house,

and from being present during the whole of the evening, must have known all that passed, was not once questioned by the Chief Justice, as to his knowledge of Hicks, or as to Lady Lisle's knowledge of him. Nor was the bailiff's wife, who was also a witness, examined upon that point. Yet these were the persons, from whom the fullest information might have been expected. They had the best means of knowing, whether any thing transpired, in the course of the evening, which could excite a suspicion of Hicks having been engaged in the rebellion; or whether Lady Lisle had previously any cause for such suspicion. This omission, on such an important part of the charge, is so remarkable, when contrasted with the minuteness and care, with which the other witnesses, and especially Dunne, had been before examined, that there is too much reason to suspect, that it was designed by Jefferies, from an apprehension of his making a weak case still weaker, and of hazarding the fate of the prosecution. The result of this inquiry is, that the fact of Hicks being a traitor was not legally proved; nor was it proved, that Lady Lisle knew of his having done any act, that could subject him to a charge of treason. Consequently the

prosecution entirely failed ; and the Court should have directed an acquittal, even without summing up the evidence to the jury.

“ It was the hard fate of this unfortunate lady to fall into the hands of, perhaps, the worst judge, that ever disgraced Westminster Hall* : ” — such is the language of a distinguished judge of later times. Her death can scarcely be considered less a murder than that of her husband. He fell by the hand of an assassin, at Lausanne. She suffered by an illegal sentence in her own country. For this proceeding no excuse can be suggested. Lady Lisle was not connected with any political party, and had never been suspected of disloyalty. Though her husband had held high offices under the Commonwealth, yet she had supported the royal cause, and befriended the royalists in their distress. What she said of herself was perhaps strictly true, that nobody in England had shed so many tears upon the death of Charles I. From the time of the Restoration to the time of her trial, she had, on all occasions, evinced her firm attachment to the Crown. Her son she had bred up for the army ; and he bore arms against the rebels

* See Mr. Justice Foster's Disc. p. 345.

at the battle of Sedgmoor. This was the individual, on whose behalf a petition for a pardon was presented, and pardon refused. Even her prayer, for a reprieve of four days, was rejected by the King, who declared, that he had given a promise to his Chief Justice not to interfere in the business; an excuse, which made the measure appear still more harsh, by proving it to have been deliberate.

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NOTE.

NOTE A. p. 166.

JOHNSON LISLE was the son of Sir William Lisle, of the Isle of Wight. He was member of the Long Parliament, one of the Council of State, commissioner of the great seal, and assistant to the Lord President in the High Court of Justice for the trial of Charles I. On the Restoration he quitted his country with his friend General Ludlow; and took refuge at Lausanne, where he was assassinated by two Irish ruffians, who hoped to make their fortune by this piece of service. (See Ludlow's Memoirs, and Burnet's History.)

The Chief Justice in many parts of the trial, threw out sarcastic reflections against the prisoner's husband. Lady Lisle having observed, that she hoped she should not be condemned, without being heard; "No, God forbid," retorted the Chief Justice: "that was a sort of practice in your husband's time: you know very well, what I mean. But God be thanked, it is not so now. The King's Courts of Law never condemn without hearing." (P. 351.)

THE TRIAL
OF
ELIZABETH GAUNT,
AT THE OLD BAILEY,
FOR HIGH TREASON.

1 James II., 1685.—11 *Howell*, 409. 414. 421.

HUME, in his history, has given a short and striking account of the subject of the following trial. "Of all the executions, during that dismal period which followed the Duke of Monmouth's rebellion, the most remarkable were those of Mrs. Gaunt and Lady Lisle. Mrs. Gaunt was an Anabaptist, noted for her beneficence, which extended to all professions and persuasions. One of the rebels, knowing her humane disposition, had recourse to her in his distress, and was concealed by her. Hearing of the proclamation, which offered an indemnity and rewards to such as discovered criminals, he betrayed his benefactress; and bore evidence against her. He received a

pardon as a recompense for his treachery; she was burned alive for her charity.”*

P. 409.

The prisoner was indicted for imagining and conspiring the death of the late King, and for conspiring to raise a rebellion. The overt act, charged in the indictment, was the concealing and maintaining of Burton, and the assisting of him to escape, knowing that he was a traitor, and that he had imagined the death of the King, and had conspired to levy war.

P. 414.

The Attorney-General, Sir Robert Sawyer, opened the case shortly for the prosecution. “In the former trial,” said he, “you had an account of her husband, and in this you will hear, that she and her husband were the great brokers for carrying over such traitors as Lord Shaftsbury and others.”

The witnesses for the prosecution, were Burton, his wife, and daughter. Burton was first called, and desired, in a leading question, to give an account of the prisoner’s harbouring of him, and of his being engaged in the business of the Rye-house. He stated, that Keeling one morning desired

* Hume’s Hist. of James II. ch. 70.

him to meet him at a tavern, which he named, and to ask for number *five*. He accordingly went, and Keeling came in, with two others: Rumbold was one of them, and he talked about privileges: he said, his house was convenient, and that there they might do the business. "But, before they had done," said the witness, "I found they designed to kill the King. Then, said we, if you are for killing, we have done: and so we broke up; and that was the end of it. Afterwards Keeling made a discovery: after which, I was in the proclamation for being at the meeting, and absconded, and lay hid." While he was so concealed, the prisoner came to him, and told him, that there were some persons about to make their escape, and wished him to go along with them, to which he assented. She told him, that they had provided horses, and that a vessel was ready to carry them over, and that he must be ready at a certain time, when she would call for him. She called according to appointment, and he went with her, and afterwards escaped. "But how came Mrs. Gaunt to take so much care of you?" asked the Attorney-General. "She might think," said the witness, "that I knew something of her husband, if I should be taken;

I suppose that might be the chief thing.” “What had her husband done?” “Her husband I suppose, (answered the witness,) knew something of the business.” “What business?” asked the Attorney-General. “The business about seizing the Tower.

Att. Gen. Did she know what you were concealed for?

Burton. Every body knew that, because I was in the proclamation.

P. 417. L. C. J. Did she tell you, that you were in the proclamation?

Burton. No, she did not tell me so.

Burton's daughter, who was next called, proved not a single material fact. And all that the wife proved (if her statement is to be confined to what was strictly evidence,) was merely a promise by the prisoner to take care of her husband, if she would consent to his going away. She did not prove, that any assistance had been given by the prisoner to her husband, to facilitate his escape; and she never had any conversation with the prisoner as to the reason of his going away, or on the subject of the proclamation.

At the end of the trial, and after the prisoner's defence, a pardon to Burton, under the Great Seal, was produced in evidence, for

the purpose of making him a competent witness. But this proof was unnecessary, as it did not appear, that he had been convicted or prosecuted to outlawry.

In support of the prosecution, there was no proof, that the prisoner knew of Burton's having been engaged in any conspiracy; or that Burton had, in point of fact, been so engaged; nor was there any proof, that a proclamation had issued, in which his name was inserted. On this failure of proof, the course, adopted by the Court, was to subject the prisoner to a cross-examination, in order, if possible, to extract some answer, that would raise an inference of guilt. This was a practice not uncommon in former times; and, in several cases, as the reader may remember, it was used greatly to the prejudice, if not to the ruin, of the accused. The examination was in the following terms:

Lord Chief Justice Jones. What say you, P. 419. ~~women~~, to this evidence? Several witnesses say, you were very busy in contriving the escape of Burton. What was the reason, why you would send him away?

Prisoner. I did not contrive to send him away.

L. C. J. The woman says so ; Burton says so ; the daughter says the same.

Pris. I deny it.

L. C. J. And you gave him money afterwards?

Pris. Who saw me give it him?

L. C. J. He swears it.

Pris. He was the more beholden to me.

L. C. J. Did you, or did you not?

Capt. Richardson. She says, she is not come here to tell your Lordship what she did.

L. C. J. Woman, did not you hear, that Burton's name was in the proclamation?

Pris. It is like I might.

L. C. J. You might hear it?

Pris. Yes.

L. C. J. And yet you would by all means help him to escape?

Pris. I can say nothing against it, if they swear it.

L. C. J. Do you know what you are charged withal? You are accused of relieving and comforting Burton, whom you knew to have committed treason.

Pris. My Lord, he says so.

L. C. J. And for helping him to escape, and giving him money in order to it?

Pris. He says so.

L. C. J. He swears so. What do you say?

Pris. Is that sufficient?

Mr. Justice. Aye, and another swears it.
That is sufficient.

Pris. I have not heard any body else swear it.

Mr. Justice. Yes, his wife.

Pris. Not about the money.

Mr. Justice. You came and solicited him to go several times.

Pris. It is very untrue, my Lord.

L. C. J. Did you know his house had been searched, to find him?

Pris. I did not know it. A great while since, I might know it.

L. C. J. Have you any more, woman, to say for yourself? If you can, tell us any other cause than that he was guilty of treason, wherein your husband was concerned.

Pris. No. I deny, that I know my husband was concerned in any thing of that kind.

L. C. J. Wherefore, then, would you take so much care to send him away?

Pris. I do not tell you, my Lord.

L. C. J. You don't tell us? but the witnesses have sworn it.

Pris. I must leave it to them.

The Lord Chief Justice then summed up

the case to the jury. "This woman," said he, "stands indicted for high treason, for concealing and relieving one Burton, a person that had committed high treason." The most material part of the charge, which was, that she *knew* him at the time to have committed treason, was overlooked. After stating the evidence, not very correctly, the Chief Justice continued thus: — "It is true, there is no direct proof of any particular mention, that Burton was in the proclamation for that treason; but the woman says, and Burton himself says, that they do both verily believe, that the prisoner at the bar did *knew*, that he was in the proclamation; and, therefore, there was no particular discourse concerning it. And she herself, being examined, says, she might hear that his name was in the proclamation, and that his house was searched, and that he could not be found. And yet, notwithstanding all this, she endeavours to conceal him. What can be the meaning of all this, but that she was zealous to maintain the conspiracy, and was a great assistant to all persons concerned in it? She will not tell you any other cause, wherefore she should be concerned to convey this man beyond sea; and, therefore, in all reason you ought to conceive it was for this; it was a known cause, made

known to all people by the King's proclamation."

After the summing up, the prisoner applied for leave to have some witnesses called in her defence — a favour, which had been granted in a former trial. The Court refused, and ordered the officer to take the verdict. It is scarcely necessary to add, after such a direction to the jury, that the prisoner was immediately convicted. On the fourth day after P. 450. the trial, she suffered the sentence of the law, which at that time was burning to death. [NOTE A.]

This unfortunate woman was tried, convicted, and burnt to death, without the least regard to law or justice. The charge against her was not proved: there was not even a *prima facie* case, fit to be submitted to a jury for their consideration. It was not proved, that the prisoner knew of Burton being named in a proclamation; nor was any proclamation produced, in which his name was inserted. It was not proved, that the prisoner knew of his being concerned in the Rye-house plot, or in any other conspiracy. What is still more remarkable, there was no proof, that Burton had committed any overt act of treason. On the contrary, it appears

Remarks.

from his statement, (and no other witness said any thing upon this part of the case,) that he broke with Rumbold and Keeling, and left them, as soon as he heard of their having a plan against the life of the King. Even if Burton had been proved to have committed an overt act of treason, it seems to be clear, that the prisoner could not be legally convicted of receiving him afterwards, without some previous proof of Burton's conviction or outlawry.* Such was the case, in which the Lord Chief Justice, Sir W. Jones, summed up strongly against the accused. He appears to have adopted as a principle, that the acts of the prisoner ought to bear the worst construction, and that guilt must be presumed, unless innocence be proved.

The practice of cross-examining the prisoner, which was carried in this case to a most unjustifiable length, and, probably, led to her conviction, was common in the earlier times. After the period of the Revolution, it fell into disuse, and is now reprobated as inconsistent with the notion of a fair trial. This change in the practice of our Courts, which is generally considered an improvement, has been

* See Foster, C. L. 345. 1 Hale, P. C. 238. 2 Hale, 222. Lady Lisle's case, *supra*. p. 196.

treated by one modern writer as the effect of prejudice, and is attributed by him to a misguided feeling of humanity. "Le préjugé," observes Mr. Bentham, "en faveur de cette règle est tellement enraciné, on a tellement fasciné l'esprit public avec les mots de prudence, de sureté, de sensibilité, et de respect pour les malheureux, qu'il faut plus de courage pour combattre en Angleterre cette opinion nationale, que pour attaquer des intérêts plus puissants et plus dangereux."* It is clear, that the old practice of cross-examining the accused would scarce ever fail to detect guilt, if the accused is guilty. And this, it must be admitted, is an argument, perhaps the only argument of any weight, in favour of such a practice. But it is a much stronger argument on the other side, that the practice would frequently confound the innocent with the guilty. If it would detect guilt, it would also endanger innocence. Questions from a judge, even from the most impartial and humane, would often surprise, embarrass, and confound the accused. Sometimes even

* *Traité des Preuves Judiciaires*, Tom. 11. Liv. 7. ch. 11. p. 125. The reader is referred to an able review of this work in the seventy-ninth number of the *Edinburgh Review*.

an innocent person might equivocate, or be guilty of misrepresentation, from mere alarm; and sometimes he might refuse to answer. This embarrassment, equivocation, or silence, would inevitably be imputed to the consciousness of guilt. Independently of this prejudice to the accused, the appearance of personal altercation, which a cross-examination is too apt to excite, would lower the dignity of a judge, and in the same degree lessen the respect due to Courts of Justice.

NOTE.



NOTE A. p. 213.

By a statute passed in the year 1790, this part of the old sentence, on the conviction of a woman for high treason, and petit treason, was altered ; and hanging by the neck was substituted for burning to death. By the stat. 54 G. 3. c. 146., the horrible practice of embowelling was repealed, in all cases of high treason, and power is given to the King to remit the drawing on the hurdle, and to order, instead of hanging by the neck, a severing of the head from the body.



THE
TRIAL OF CORNISH,
AT THE OLD BAILEY,
FOR HIGH TREASON.

1 James II. 1685. — 11 *Howell*, 388. 411. 422. 440.

IT might have been hoped, (says Hume, writing of the trials which occurred after the Duke of Monmouth's rebellion) that by all these bloody executions, a rebellion so precipitate, so ill supported, and of such short duration, would have been sufficiently expiated. But nothing, he adds, could satiate the spirit of rigour, which possessed the administration. Even those who received pardon, were obliged to atone for their guilt by fines, which reduced them to beggary; or where their former poverty made them incapable of paying, they were condemned to cruel whippings, or severe imprisonments. Nor could the

innocent escape the hands, no less rapacious than cruel, of the Chief Justice.*

Goodenough, the seditious under-sheriff of London, who had been engaged in the most bloody and desperate part of the Rye-house conspiracy, was taken prisoner after the battle of Sedgmoor, and resolved to save his own life by an accusation of Cornish, the sheriff, whom he knew to be extremely obnoxious to the Court. Colonel Rumsey joined him in the accusation; and the prosecution was so hastened, that the prisoner was tried, condemned, and executed in the space of a week.†

P. 388. The prisoner, was indicted for contriving and imagining the death of Charles II., and for conspiring to procure rebellion. The overt act, charged in the indictment, was, that the prisoner, knowing that the Duke of Monmouth, Lord Russell, Sir Thomas Armstrong, and others had lately before conspired the death of the King, traitorously promised to them, that he would be aiding and assisting in the said treason, to be done and brought to effect.

P. 412. After his arraignment, he applied to the

* Hume's Hist. James II., ch. 70. † Ibid.

Court to postpone the trial, on account of the absence of a most material witness, who was in Lancashire, and whose attendance he had not been able to procure in the short interval of five days subsequent to his apprehension. He submitted also, as another ground of postponement, that he had only just been made acquainted with the precise nature of the prosecution. For though he knew, that he had been apprehended for treason, yet it was not until his arraignment, that he had been apprised of the specific nature of the charge; nor did he know before, that he was about to be tried for a treason, supposed to be committed in the reign of the late King. The Lord Chief Justice declared, that the Court could not postpone the trial, without the consent of the Attorney General. The trial then proceeded.

The first witness, Rumsey, stated, that about P. 425. the latter end of October, or the beginning of November, in the year 1682, he went with a message from Lord Shaftsbury to the house of Sheppard; that he there found the Duke of Monmouth, Lord Russell, Lord Grey, Sir Thomas Armstrong, Ferguson and Sheppard met together; they were just going away, when he entered. The message was, to enquire what issue they had

come to about the rising, and to press them to it ; for they must either come to a resolution to rise, or must let it fall. On receiving this message, they told him, that they were disappointed by Trenchard. When the party were going away, Sheppard was called for by his man, and went down stairs, and brought up the prisoner, saying Mr. Alderman Cornish was come. The prisoner, on entering the room, made his excuses for not coming sooner, and for not being able to stay with them. He said, the reason of his not being able to stay was, that they were to meet that night about their charter. Upon this, Ferguson drew out a paper from his bosom ; they told the prisoner, that it had been read, and desired to read it to him ; Ferguson accordingly read it, while Sheppard held the candle. After it had been read, they asked him, how he liked it ; and he answered, that he liked it very well. The first part of the paper complained of the misgovernment of the late King ; and, said the witness, there were two points, for which they declared, which I remember very well ; the one was liberty of conscience ; the other was, that all, who would assist in that insurrection, should have restored to them any lands of the Church, or of the Crown, which they

had gained in the late war. The witness did not hear all the paper, nor did he take great notice of it. The paper, continued the witness, was a declaration upon the rising, which was to be dispersed abroad, as soon as the rising took place. Cornish said, he liked the declaration, and he would appear to back it, with the small interest which he had ; or spoke words to that effect.

The second witness, Goodenough, was P. 426. called, and objected to by the prisoner, on account of his being outlawed for high treason. A pardon under the great seal was produced ; and the witness was then examined. He said, " There was a design to rise in London ; we designed to divide it into twenty parts, and out of each part to raise five hundred men, if it might be done, to make an insurrection. The five hundred men were to take the Tower, and drive the guards out of the town. Before this was agreed to by us, I chanced to be at Alderman Cornish's. I told him, that as the law would not defend us, some other way must be thought of ; upon which he said, I wonder the city is so unready, and the country so ready. I said to him, there is something thought of to be done here ; but, in the first place, the Tower must be

seized, where the magazine is." The prisoner made a pause, then said, "I will do what I can, — or what good I can." The witness stated further, that some time afterwards, the prisoner met him on the Exchange, and asked, how affairs went? — This was the substance of the evidence produced in support of the prosecution.

Defence. The prisoner denied, that he had ever been at any meeting at Sheppards', or that Goodenough had ever said any thing to him, respecting the seizing of the Tower. He observed, also, on the extraordinary circumstance, that Rumsey had never accused him before this time, though it was well known that the government would not have neglected any opportunity of proceeding against him; and imputed the conduct of Goodenough to spleen and ill-will, on account of his having opposed him in the appointment to the office of under-sheriff in the city of London.

After calling some witnesses to prove facts, (which however were quite immaterial,) he proposed to shew, by means of a printed report of the trial of Lord Russell, that Rumsey, who was a witness on that trial, distinctly stated, that he was not present at the time when the declaration was read. But this report of the

trial, not being strictly legal evidence, though printed by authority, was objected to, and properly rejected ; and no other proof of the fact was tendered.

The Chief Justice summed up the case P. 437. much more strongly than the evidence warranted, and made some insinuations against the prisoner. After the jury had retired for an hour to consider their verdict, and while they were returning, Cornish suggested to the Court, for the first time, that he had forgot to call Sheppard, who was a material witness in his defence. The Court, with great reluctance, at length allowed this witness to be called.

Sheppard stated, that, at one of the meetings P. 442. at his house, Cornish came in to speak to the Duke of Monmouth, or to some other person ; that he went up stairs with the witness, and went out with him, and while he was there, not a word was read nor a paper seen. The witness said, that he remembered a declaration to have been read, which was produced by Ferguson, but he did not remember that Cornish was in the house that night, and was sure that it was not read while Cornish was present.

The King's Counsel insisted strongly on the agreement, which appeared between Shep-

pard's account of some unimportant facts, and Rumsey's account of the same facts, as confirmatory of the general narrative of the latter witness, and as contributing to the general credit of his testimony. With just as much reason might it have been said, on the other side, that Sheppard acquired credit from the confirmation of Rumsey, as that any credit was reflected on Rumsey from the confirmation of Sheppard. In truth, such a coincidence in some particulars was unavoidable, unless Rumsey's evidence had been entirely false, (which was never supposed,) or unless Sheppard had come prepared to contradict him in every part, which is not at all probable. After the evidence of Sheppard, which closed the defence, the jury withdrew again for a short time, and returned with a verdict of guilty.

Reversal
of attain-
der.

The attainder of Cornish was reversed by act of parliament in the first year after the Revolution. The act recites, as the ground of reversal, that the prisoner was tried so soon after his apprehension, that he was taken by surprise, and had not the means of defending himself; and that he had been convicted on the single testimony of Rumsey, who was in the most material parts of his evidence contradicted by Sheppard, and also made a

statement inconsistent with that which he had before given in the trial of Lord Russell.

The first remark to be made upon this trial Remarks. relates to the evidence of Goodenough. That witness gave an account of a treasonable design, entertained by himself and others, to raise an insurrection in the city; but as no such design appears ever to have been communicated to the prisoner, he was not answerable for any part of its guilt. It is clear, also, from the evidence of Goodenough, that this design had not been settled or agreed upon, nor does it appear to have been even formed, until after the time of his conversation with the prisoner; the conversation, therefore, between the prisoner and the witness could have no reference to this design of a rising in the city. The only other treasonable scheme, to which the words of the prisoner can be supposed to refer, was the plan mentioned by Goodenough, of seizing the Tower — if that can be called a plan, which seems not to have ripened into a settled design, but to have been thrown out, in loose discourse, as a mere suggestion or opinion. But, supposing that the language of the prisoner could fairly bear a treasonable construction, as having been spoken with reference to some design, this objection

would then occur, that the proof did not apply to the charge in the indictment. The overt act charged, was the promising to aid and assist the Duke of Monmouth, Lord Russell, and Sir Thomas Armstrong in their treason—referring clearly to the alleged treasonable meeting at the house of Sheppard. But Goodenough was a stranger to that party; “he knew nothing (as he stated himself,) of the business of Lord Russell;” and there is not the least reason for supposing, that the measure, so hastily recommended by Goodenough, respecting the seizing of the Tower, formed any part of their designs. A promise, therefore, by the prisoner, to assist in the proposed attack on the Tower, (even supposing that there had been such a promise made by him, which does not appear to have been the case,) was entirely distinct from an engagement to assist the Duke of Monmouth, and the other persons named in the indictment.

Hence it appears, first, that the conversation between Goodenough and the prisoner was too loose and general, to be considered of a treasonable nature. Secondly, it had no reference to the conspiracy, in which the Duke of Monmouth, and the others, were supposed to have engaged; in other words, it had no reference

to the single overt act charged in the indictment ; consequently, was foreign to the subject matter in issue, and ought not to have been admitted in evidence. If the remarks here made are just, it follows that, in reasoning on this trial, the evidence of Goodenough must be laid out of the case ; and the only remaining proof will be the evidence of Rumsey ; a single witness, on whose unsupported testimony the prisoner could not be legally convicted.

Rumsey, it will be remembered, was called to prove the prisoner's assent to a written declaration of a treasonable nature, and his promise to assist in carrying it into execution. The original writing was not in his possession ; he had neither a copy, nor an extract. He admitted, that he had not heard the whole of the paper read, and that he had not taken much notice of its contents. Such a careless and partial hearing, so far back as three years before the trial, without any motive for remembering, and without any means of assisting his memory, was much too uncertain and treacherous, to be trusted even in a cause of little moment. Further, this evidence was directly contradicted by Sheppard, who positively affirmed that no part of the

declaration was read in the presence of the prisoner.

In comparing the evidence, which Rumsey gave on this trial, with his former statements, relative to the same transaction, it is remarkable how much they varied from each other. On his first examination, before the Privy Council, which was about half a year after the meeting, he did not mention the prisoner, in giving the names of the party present, nor did he say a word respecting a declaration.* On the trial of Lord Russell, he was at first uncertain, whether he had heard a declaration read; at last, he acknowledged, that it was not read in his presence†: and on that occasion, as well as on the former, the prisoner was not named by him as one of the party. However, his memory appears to have been so much refreshed, after an interval of several years, that on the trial of Cornish he could speak positively to entire sentences in the written paper; and professed to remember distinctly, that the prisoner was present at the reading of the declaration, and that he approved of its contents. This readiness in supplying new facts, to serve a particular occasion, would be

* See 9 Howell, p. 380.

† Ibid. 597. 601.

suspicious in any witness ; but much more, in an accomplice, who ought to have disclosed the whole truth in the first instance. The witness pretended, indeed, that he had kept back the name of the prisoner, from a feeling of compassion ; — a motive, for which he will not easily receive credit, when it is remembered, that he was himself a party to the plan of assassination in the Rye-house plot, and that he afterwards strained his evidence to the utmost against his companions, without scruple or remorse.

The conduct of the Judges towards the prisoner was harsh and illiberal.* “ How often did he entreat their patience in vain ! How often did he encounter their sneers and ridicule ! If he protested his innocence, he was reminded, that Lord Russell also professed innocence to the last, and that few in Court would believe his protestations. If he insisted on the improbable circumstances, in the evidence for the prosecution, the argument was treated with contempt. When he

* The following remarks on the treatment of the prisoner (which are well warranted by the Report of the Trial,) are taken, with some few alterations, from a tract of Sir John Hawles, who was Solicitor-General after the Revolution. — See 9 Howell, p. 455.

produced witnesses, to speak to his general character of loyalty, insinuations were thrown out against their honesty ; and he was asked significantly, whether he could bring any man in *London* to attest his character. ‘ I wonder,’ said the Lord Chief Justice, ‘ you do not call some worthy aldermen who are known persons, to prove your loyalty.’—“ No explanation can be given of these proceedings,” adds Sir John Hawles, “ but that some of the Judges had newly come out of the West, where they had been so flushed and hardened, that nothing appeared to them rigorous and cruel ; and the others seemed to vie with them in their practice.”*

* See 9 Howell, p. 455. et seq.

THE TRIAL
OF
HENRY LORD DELAMERE,
IN THE
COURT OF THE LORD HIGH STEWARD,
AT WESTMINSTER.

1 James II., 1686.—11 Howell, 510.

LORD DELAMERE* was committed to the Tower P. 519.
under a warrant of Lord Sunderland, on a
charge of high treason, in July, 1684. In the
November following, the Peers addressed a
message to the King, requesting to know the
reason, why Lord Delamere, a Peer, was absent
from his attendance : to which message an an-
swer was returned, that he had been committed

* Lord Delamere had given great offence to the King, by speaking in Parliament in favor of the Bill of Exclusion; and had offended the Lord Chancellor Jefferies, by exposing his misconduct while Chief Justice of Chester. Lord Delamere was one of the first Peers who declared for the Prince of Orange. Under the new government he was appointed to the office of Chancellor of the Exchequer, and afterwards created Earl of Warrington.

for high treason, and that directions had been given to proceed against him with all speed. The House of Peers, not satisfied with this answer, had a debate upon the subject, when the Lord Chancellor informed the House, that the treason, of which he was accused, was committed in Cheshire; and that being a county Palatine, the prosecution ought to be there, and not in the King's Bench, as it might be, if the treason had been committed in another county. He added, that the King had given an order for a commission of Oyer and Terminer to issue into Cheshire, that a bill might be presented against him for the said treason; which commission of Oyer and Terminer was already sealed; and if the indictment should not be found before the end of the term, Lord Delamere might apply to the Court of King's Bench, and might be bailed. Within a few days afterwards the Parliament was prorogued for three months.

The trial of Lord Delamere was brought forward during the Prorogation. He was
P. 511. tried before the Court of the Lord High Steward on the 14th day of January, 1686. The Lord Chancellor Jefferies had been appointed Lord High Steward, by royal commission, to preside at the trial; and by his

summons, a select number of Peers were called together, for the purpose of trying the prisoner. Twenty-seven Peers answered to their summons, several of whom held high offices under the crown. The Lord High Steward then stated to the prisoner, that the King, being informed that he was accused of high treason, not by common report of hearsay, but by a bill of indictment, found by the grand jury of the county Palatine of Chester, had thought it necessary, as well from a feeling of tenderness towards the prisoner, as from a sense of justice to himself, to order a speedy trial. "If you are conscious to yourself," said the Lord High Steward in conclusion, "that you are guilty of this heinous crime, give glory to God, make amends to his Vicegerent the King by a plain and full discovery of your guilt, and do not, by any obstinate persisting in the denial of it, provoke the just indignation of your Prince, who has made it appear to the world, that his inclinations are rather to show mercy than inflict punishment."

P. 515.

The prisoner, on being called upon to answer to the indictment by holding up his hand, enquired, whether as a Peer of England he was obliged, like a commoner, to hold up his hand.

The Lord High Steward answered, that he would not take upon himself to determine a question of privilege of Peerage; but added, that if the prisoner knew himself to be the person indicted, the act of holding up the hand was only a formality, and not of much consequence. Lord Delamere also wished to know, whether he ought to address himself to the Lord High Steward alone, or to him together with the rest of the other Peers. The Lord High Steward answered, that whatever he might wish to say must be addressed to him, since he was the sole judge of the Court, before whom the trial must proceed, and not one of the triers of the prisoner.

P. 517. The indictment upon which he was arraigned, and which had been found by the grand jury of the county Palatine of Chester, was then read. It charged the prisoner with the imagining and compassing of the death of the King, and that, in order to carry this traitorous design into effect, he consulted and agreed with other traitors to raise money and armed men for the purpose of levying war and rebellion, and for the suprising and taking of the city and castle of Chester; and that he took a journey from London to Mere, in the county of Cheshire, to complete his traitorous

purposes : and excited and persuaded others to join him in rebellion against the King. Lord Delamere requested to be allowed to say a few words, before he pleaded. The Lord High Steward informed him, that he could not be heard, till he had pleaded to the indictment.

Lord Delamere then put in a special plea, P. 520.
in which, after stating the facts mentioned in the opening of this case, he pleaded to the jurisdiction of the Court, insisting, that since the Parliament, though prorogued, still continued, he could only be tried by the whole body of the Peers of England. The Attorney-General, Sir Robert Sawyer, insisted in answer, that, on the trial of a Peer during a session of Parliament, all the Peers are judges, but that during a prorogation the proceedings must be before the Lord High Steward by commission ; and maintained, that he was not bound to demur formally to the plea, as it had not been signed by counsel, and was in other respects irregular. In reply to the latter part of this argument, Lord Delamere requested, that he might have counsel assigned to him, to draw out the plea in form, and argue the point. The Lord High Steward P. 522
gave his judgment, that the Court had jurisdiction, and cited the case of Lord Corn-

wallis*, who had been tried by the court of the Lord High Steward during a prorogation. With respect to the allowance of counsel, he declared, that by the general rule of law, a plea to the jurisdiction ought not to be favoured, and the party ought to be ready to maintain it at the time of pleading; however, added he, if the counsel were then ready to argue the point, he would not refuse to hear them. To this Lord Delamere submitted, that as counsel had not been assigned to him, they could not be expected to be ready, and it was not in his power to produce any at the moment. The Lord High Steward then peremptorily ordered, that the plea must be overruled and rejected.

P. 526. The Lord High Steward then delivered a charge to the prisoner. He commenced by alluding to the Exclusion-bill, in which business Lord Delamere had taken an active part, and which he described to be an insolent attempt upon the succession to the crown, by the fierce, froward, and fanatical zeal of some members of the House of Commons, under the specious pretence of religion. Thence he proceeded to the Rye-house plot;

* See 7 Howell, p. 143.

thence to the Duke of Monmouth's rebellion, and the attainder of the Duke of Monmouth; and alluded to Lord Delamere's dissent on that question. He concluded by desiring the Peers to be tenderly careful of the prisoner, if they should find him innocent; and reminded them, that the King had too much confidence in their affection to him to believe, that they would acquit the prisoner, if he should appear to be guilty.

After the opening of the case by the Attorney-General, the first witness called was the noted Lord Howard of Escrick. He was desired to state what he knew of a design of an insurrection, that was to have taken place in the late King's time — in what parts it was to have been — and what share Cheshire was to have had in it? Lord Howard declared, that he had nothing to say against the noble Lord at the bar. Upon which, the Lord High Steward informed the witness, that he was only to give an account of what he had known to be agreed upon, in any consultations about a conspiracy for an insurrection in the late King's time. The witness then stated at length what he had heard from Lord Shaftsbury and Captain Walcot, respecting the designs of the Rye-house conspirators, which need not

P. 531.

be repeated here, as they are perfectly irrelevant and foreign to these proceedings.

P. 538. The second witness was Lord Grey. He was desired to state, whether he knew of any design of a rising in Cheshire. He stated, that soon after the election of Sheriffs for the city of London, which produced such a ferment, the Duke of Monmouth and Lord Shaftsbury came to the resolution, that they would exert all their interest to procure a rising in three several parts of the kingdom at once: in Cheshire, to which county the Duke of Monmouth was to betake himself, and there to be advised by Lord Macclesfield, Lord Brandon, and the prisoner at the bar: in London, which was to be assigned as the province of Lord Shaftsbury; and in the west, under the superintendence of Lord Russell. He stated further, that the Duke of Monmouth very much depended upon Cheshire, and upon the three Lords Macclesfield, Brandon, and Delamere. This was all he knew of a design in Cheshire.

P. 540. The third witness, Wade, stated, that the Duke of Monmouth, being about to quit Amsterdam on his expedition to England, sent Captain Matthews to apprize his friends in Cheshire of his intentions, that they might

be ready on his landing: that Lord Delamere was mentioned by the Duke, as one of his friends: that the Duke afterwards set sail from Holland, and landed at Lyme, and thence directed his march to meet his Cheshire friends. Another person, also, of the name of Jones, was sent over to England by the Duke of Monmouth, with directions to inform Lord Delamere, Lord Macclesfield, and Lord Brandon, of the state of his preparations; and that he expected them to raise as large a force as they could muster, for his support.

Goodenough also spoke of the Duke of P. 542.
Monmouth's directions sent by Jones, and added, that the Duke had said, he hoped Lord Delamere would not break his promise. This witness further stated, that he had been informed in Holland, that Lord Delamere was one of those Lords who had promised to draw his sword in the Duke of Monmouth's behalf. The Lord High Steward asked Lord Delamere, whether he would put any question to the witness. Lord Delamere declared he had never seen his face before. "That is pretty strange," replied the Lord High Steward, "so famous an under-sheriff of London and Middlesex as he was."

P. 545. Jones was the next witness. He stated, that the Duke of Monmouth sent him from Amsterdam to England, and delivered to him a sealed paper of instructions, which he was to open, as soon as he was at sea. On his landing in England, he was ordered to repair to Captain Matthews, and desire that he would inform Lord Macclesfield, Lord Brandon and Lord Delamere of the Duke's intentions to sail for England; and direct them to be ready to repair to their posts immediately on his landing. He opened the letter of instructions, as desired, which appointed Taunton for the place of meeting.

P. 547. Story repeated an account which he had received from a third person, who told him that Jones delivered his message to Disney, who delivered it to Lord Delamere on the 27th of May, who went out of town the same night with two friends through Enfield Chase towards Hatfield. The witness also stated; that he had heard the Duke of Monmouth speak of his great dependence upon Lord Delamere.

P. 549. Vaux was one of the persons who went out of town with Lord Delamere. He stated, that he rode, on the night of the 27th of May,

to Hoddesdon with Lord Delamere, who travelled under the feigned name of Brown ; that Lord Delamere was going into Cheshire, as he said, to visit a sick child. Another witness, of the name of Edlin, gave similar evidence.

Paunceford said, he had heard Edlin give P. 551.
an account similar to that which Edlin had just stated. He said, that he had heard of printed declarations of the Duke of Monmouth having been sent to Lord Delamere in the country ; and that he also heard Disney speak of Lord Delamere by the name of Brown.

Hope proved, that Lord Delamere, a few days before the breaking out of Monmouth's rebellion, passed through Coventry, and returned a few days afterwards. That within about a week, Lord Delamere made the same journey again. He stated further, that Lord Delamere, while at Coventry, pointed out to the witness the Duke of Monmouth's route, and observed to him, that there would be many bloody noses before the business was at an end.

Saxon was the only witness who gave any P. 555.
material evidence against Lord Delamere. He stated that, at the beginning of June preceding (he believed the third or fourth of June), he had been sent for to Mere, Lord

Delamere's house ; and that when he came thither, he was conducted into a lower room, where he found Lord Delamere, Sir R. Cotton, and Mr. Crew Offley. They told the witness, that he had been recommended to them by Lord Brandon as an honest useful man, and that they hoped he would prove so ; and told him further, that they had sent to the Duke of Monmouth in Holland, and received an answer by Jones ; and that as soon as they had the answer, Lord Delamere came post into the country, under another name, to raise 10,000 men in Cheshire for the Duke. That they asked him, whether he would undertake to convey a message to the Duke, which he agreed to do ; and for this service he received from Lord Delamere between eleven and twelve guineas, and delivered the message.

The witness, in cross-examination, stated, that he had given this account for the first time at Dorchester, a fortnight after he had been taken prisoner in the rebellion, and then mentioned it to another prisoner ; that he had never been before employed by Lord Delamere, and had never been before in his company. He was taken over to Mere by a messenger, whose name he did not know ; he and the messenger went on horseback to Lord

Delamere's house. The man went with him to the door, and let him into the house, and the witness saw no other person till he went into the room, where the company were assembled. — With the evidence of this witness, the Attorney-General closed the case for the prosecution.

The day being now nearly closed, Lord P. 559. Delamere begged to be allowed till the following morning, to review his notes of the evidence, and prepare his defence. The Lord High Steward doubted, whether there could legally be an adjournment in this case. He said, it was perfectly clear, that an adjournment might be made on a trial in full Parliament; but that, in ordinary trials, in the ordinary courts of justice, the established rule had always been, that the jury could not adjourn after the evidence closed, but ought to proceed in their inquiry, and must be kept together till they should agree in their verdict. It appeared to him, he said, a matter of serious doubt, whether the same practice ought not to be observed on trials in the Court of the Lord High Steward. He therefore proposed to refer the point to the Judges; and they were directed to consider the question, and report their opinions. They withdrew

into the Exchequer Chamber; and as the question was one of Privilege, which affected the whole body of the Peerage, the Peers also withdrew, to deliberate upon the subject. The Judges and Peers in a short time returned. The Lord Chief Justice Herbert delivered the unanimous opinion of the Judges. They acknowledged, that the question, proposed to them, had not occurred in their experience. Where the trial is by a jury, in the ordinary courts of justice, if the jury are once charged, they cannot be discharged, till they deliver their verdict. There was no doubt, said they, that in the case of a trial of a Peer in full Parliament, where the Peers are the Judges, the matter might be adjourned from day to day. But, in the court of the Lord High Steward, the Peers are not the judges, but rather in the situation of a jury, as triers only of the facts. And whether this circumstance would be sufficient to distinguish the case from the one before stated, of a trial in full Parliament, they begged to submit to the consideration of the Lords. Upon this, the Lord High Steward declared, that the Court was held before him as the sole judge; that by his warrant he had ordered the prisoner to the bar for trial; and

by his summons the Peers had been assembled. Then with many professions of tenderness and anxiety in cases of life and death, he directed the prisoner to proceed in his defence.

Lord Delamere made an impressive speech P. 564. in his own defence. He said, he felt no fear Defence. in speaking for himself, even in such a presence, and against such a charge: being assured of his own innocence, and assured also of the wisdom of his judges, who would not suffer themselves to be imposed upon by insinuations, but would be governed by justice and truth. He appealed with confidence to their knowledge of his loyalty and principles. The crime, of which he was accused, he from his heart abhorred. As a member of the Church of England, he had strictly conformed to its rules, yet with tenderness and charity towards those who differed from him, having been always of opinion that religion consisted in charity more than in persecution. As a magistrate, he had executed the laws courageously, duly, and impartially. In his public trust, as a member of parliament, he had discharged his duties faithfully, and had not on any occasion voted or spoken, but as his own conscience and judgment dictated. He had always made the laws the measure of his loy-

alty, and been zealous to give the King his just prerogatives, yet so as to preserve the rights of the people. These were the principles, upon which he had acted — the principles in which he had been educated by his father, a wise and good man, well known, probably, to the lords present; one who had been instrumental in rescuing the country from its confusion, and restoring the King to his throne. This, he trusted, would be considered some vindication of his character from the imputations, which had been cast upon him.

As to the particulars of the charge, though many witnesses had been produced, and there had been much swearing, yet he had found little or nothing of legal evidence that could affect him. One man alone had attempted to prove any thing positive against him; all the rest brought forward nothing but mere hearsay. The proof of such remote circumstances, such a deficiency of direct and positive evidence, such an accumulation of hearsay, by showing that nothing worse could be adduced against him, rather tended to raise a presumption of innocence than of guilt.

Lord Delamere concluded his defence, with repeating a passage from the speech of the Earl of Nottingham on the trial of Lord Cornwallis: "I know, you will weigh the fact with all

its circumstances; from which it is to receive its true and its proper doom. As you are too just to let pity make abatement of crime, so are you too wise to suffer rhetoric to make any exaggeration. This only will be necessary to be observed, — that the fouler the crime is, the clearer and plainer ought to be the proof. No other good reason can be given, why the law refuses to allow the prisoner at the bar counsel in matters of fact when life is concerned, excepting this; that the evidence, by which he is condemned, ought to be so very evident, and so plain, that all the counsel in the world should not be able to answer it."

Lord Delamere proceeded to call persons to speak to the character of Saxon, the principal witness against him. Upon this, the Lord High Steward suggested, that Saxon ought to be present in court, to hear what they said.

Hall was called, for the purpose of showing P. 566. that Saxon had forged a letter in the name of one Hildage. It appeared, that Saxon had admitted his having written a letter in Hildage's name; but Saxon now said, that he wrote it with his authority; and Hildage was not called to disprove the authority. The Lord High Steward said, "If Hildage were here himself, and should deny the lending of

the money, or giving him directions to receive it, you would have fixed a shrewd objection upon him; but, otherwise, hearsays and discourses at second-hand are not to take off the credit of any man's testimony." Other witnesses were called to give similar evidence in other transactions of the same description, but the evidence entirely failed.

P. 570. Another witness proved, that Saxon had hired a horse at a certain rate per day for a certain time, but neither paid the money, nor returned the horse. — "I presume," said the Lord High Steward, "he rode into the rebellion with this horse: and he was a very knave for so doing, upon my conscience."

Witnesses were called to prove Saxon's bad character. One witness spoke of his breaking his word on all occasions. "Can you instance, friend, in particular," said the Lord High Steward, "of any fraud, cheat, or cozenage, that he has been guilty of? For it is not what the town says, but what can be proved, that we must take for evidence. The town that thou livest in, may reckon thee but an idle fellow, and yet thou mayest be a very honest man for all that.*"

* It appears from this and other passages in the early State Trials, that when the character of a witness was to be impeached by the testimony of other witnesses, the

Saxon having stated, that about the third or P. 571.
 fourth of June he found Lord Delamere, Sir
 R. Cotton, and Offley together at Mere, in
 Cheshire, Lord Delamere now proposed to
 prove, that Sir R. Cotton was not in Cheshire
 for many weeks both before and after the time
 mentioned, and that he was at that time in
 London. Billing proved, that Sir R. Cotton
 came to town on the 10th of April, and staid
 there till the end of July ; that he (the witness)
 was in the house with him all that time as
 servant, and saw him constantly once or twice
 every day. Three other witnessess, Davis, Lane, P. 572.
 and Reeve, proved the same facts. Two mem-
 bers of the House of Commons also proved,
 that Sir R. Cotton transacted business in the
 House on the 2d and 3d of June, and they fixed
 the time to absolute certainty.

Sir Willoughby Aston proved, that Offley
 (one of the persons said by Saxon to have

regular practise was to prove specific acts of criminality.
 A different practice now prevails ; and the inquiry can
 only be as to the general character, not as to particular
 facts. The correct mode of examining into general cha-
 racter is by enquiring of the witnesses, whether they
 have the means of knowing the general character of the
 former witness (whose veracity is suspected), and whe-
 ther from such knowledge they would believe him on his
 oath.

P. 576. been with Lord Delamere on the 3d or 4th of June in Cheshire) was on a visit at his house from the 26th of May to the 4th of June. Two other witnesses proved, that on the 4th of June he returned to his own house, and that he was not at Lord Delamere's.

Lord Delamere's brother proved, that Lord Delamere was in London on the 3d of June, and from that time constantly to the 10th of June, and that he saw him once or twice every day. Another brother, and Lord Lovelace, proved him to have been engaged in attendance at the House of Lords on the 4th and 5th of June.

P. 579. Lord Delamere here observed upon the evidence, which he had produced to contradict Saxon; and upon that man's incredible story made some striking and forcible remarks, which may give some idea of his style of speaking. "Is it to be imagined," said he, "that I would take a man, of whom I knew nothing, merely on another's word, into so great a confidence, as to employ him about a business of this nature? I am glad that he was called in again, for your Lordships to look at him. I beseech your Lordships, look upon him. Is this fellow likely to be used in such an affair? Does he look, as if he were fit to be

employed for the raising of 10,000 men? Does he seem to be a man of such considerable interest in his country? A fellow, whom I have shown, by several witnesses, to be a man of no reputation in his country, nay, of very ill reputation. Could we have none else to employ in a matter of such moment, but such a fellow as this? One, whose neighbours would not take his word for any thing: one, so ill thought of, that he cannot be safely trusted out of Newgate, but is kept still a prisoner, and as a prisoner gives evidence here to-day? And your Lordships, I know, will not forget, that he swears to save himself; for, by his own confession, having been a rebel, he would fain exchange his life for mine. The law requires witnesses in a trial for treason to be credible. Yet, forsooth, this man, whose word none who knew him will believe, must be taken to be a man of integrity, zeal, and industry; the man of management and dispatch; the man of interest and authority in his country; and of such importance, that nothing can be done, but he must have a hand in it! My Lords, I think, I need say no more of him; your Lordships' time is precious, too precious indeed to be spent upon such a subject, and so I set him aside."

P. 580.

Lord Delamere then explained his sudden and secret journey from London into Cheshire on the 27th of May, and his sudden return from Cheshire to London, by saying, that he was called into the country by the news of the illness of his youngest child ; and hearing that a warrant was issued for his apprehension, he travelled under an assumed name. As soon as he arrived at Mere, in Cheshire, he received a letter from his wife, informing him that his eldest son was in great danger ; that if he intended to see him alive, he must use dispatch ; and that the report of the warrant, supposed to be issued against him, was unfounded. In consequence of this information he posted back to London.

Lord Delamere's mother proved her despatch to her son, requiring his presence at Mere, and proved his youngest child's illness. A physician also proved the eldest son's illness in London, the day after Lord Delamere left London.—Here closed the defence.

P. 583.

Lord Delamere again impressed upon the Court, that the whole of the evidence against him, except that of Saxon, consisted of mere hearsay, or rather hearsay upon hearsay at the third and fourth hand. That if reports are admitted to the prejudice of a party accused, not any man's life, honors, or estate are secure.

That with regard to Saxon, even if his evidence had not been falsified, he would be only a single witness against him, and not sufficient to convict in a case of treason. But his character had been impeached, and all his statements contradicted. "Would not any man," said the prisoner, "think himself in a bad condition in point of fortune, if he could produce no better evidence to prove his title to his estate, than what has been produced against me this day to take away my life? And if such evidence as this would not be sufficient to support a title to an estate, shall it be deemed sufficient to deprive a man of life, honour, estate, and all?" He conjured his judges to beware, lest they gave encouragement to false accusations, which might hereafter fall upon themselves; and concluded with these words: "Blood, once spilt, can never be gathered up again; therefore, unless the case be clear against me, you will not hazard the shedding of my blood upon doubtful evidence. God Almighty is a God of mercy and equity; the law of England is a law of mercy and equity; and God and the law require from you, as judges, tenderness in all cases of life and death. Even if the case were doubtful (which upon the proofs, that I have brought forward,

I never can believe), God and the law require you to acquit. And, now, I leave myself, my cause, and my fate in your hands; and I pray the All-wise, the Almighty God to enlighten and direct you in your determination."

The Solicitor-General, Finch, replied in a speech, destitute of all vigour, which seems to betray that he felt the weakness of his cause. He admitted, that Saxon, who alone had given any direct evidence, had been contradicted, and that he could not give an answer to the objections made against his testimony.

P. 592. The Lord High Steward, in his summing up, stated, that he found it necessary to correct a mistake in point of law, which had been urged with some earnestness by Lord Delamere; namely, that there is a necessity, in point of law, that there should be two positive witnesses for convicting a man of treason. Now undoubtedly, said the Lord High Steward, there may be such other substantial circumstances joined to one positive testimony, as will make a sufficient proof. As in this case, if your Lordships, upon the evidence that has been given here this day, should believe that Saxon swears true, and shall also believe the circumstance of Jones's coming over from

Holland with such a message upon the 27th of May, (which is directly sworn in evidence, and of which evidence, you are the judges;) and if you believe what the other witnesses have sworn, (and which is not denied by the prisoner at the bar,) as to his going out of town that night, his changing his name, and travelling in an indirect bye-road; certainly, these circumstances, if you are satisfied that he went for that purpose, do necessarily knit the positive testimony of Saxon, and amount to a second witness. Then you have two wit- P. 593.
nesses, as the law requires; especially, if the answer given by the prisoner (such as the slender account, which he gives of his frequent journies in so short a compass of time,) be not sufficient, but that there still remains some suspicion."

The Peers withdrew, and after half an hour's consultation, returned with an unanimous verdict of Not Guilty.

The exposition of the law, by the Lord High Steward, as to the requisite number of witnesses, was similar to that before given by him in the trial of Algernon Sydney. It was his favourite doctrine, that a single witness proving an overt act of treason, and another witness proving some act of the prisoner, not

in itself of a treasonable nature, but confirmed by the evidence of the former witness, would together be sufficient to convict. The instance put by him, to illustrate his opinion, was this: "If *A. B.* buy a knife of *C. D.* for the purpose of killing the King; and it is proved by one witness, that he bought a knife of *C. D.* for this purpose, and another witness prove only, that he bought the knife of *C. D.*, they are together sufficient."

Such an opinion was not warranted by the law of treason. The statute of Edw. VI. enacted, that no person should be indicted or convicted of high treason, unless accused by two lawful accusers, who, at the time of the arraignment, were to avow what they had to say against the party, to prove him guilty of the treasons contained in the bill of indictment. It is clear, from this enactment, that there must be at least two witnesses of the *treason*; and that one witness, proving an overt act of treason, with a second witness, not proving an overt act of treason, are not two legal and competent witnesses within the plain meaning of the statute.

THE TRIAL

OF

DR. WILLIAM SANCROFT, ARCHBISHOP OF CANTERBURY,
 DR. WILLIAM LLOYD, BISHOP OF ST. ASAPH,
 DR. FRANCIS TURNER, BISHOP OF ELY,
 DR. JOHN LAKE, BISHOP OF CHICHESTER,
 DR. THOMAS KENN, BISHOP OF BATH AND WELLS,
 DR. THOMAS WHITE, BISHOP OF PETERBOROUGH,
 SIR JONATHAN TRELAWNEY, BISHOP OF BRISTOL,

IN THE COURT OF KING'S BENCH,

FOR

PUBLISHING A LIBEL.

Trin. Term, 4 James II. 1688. — 12 *Howell*, 183.

IN the course of the year 1687, James II. issued a proclamation, or, as it was called, “a gracious Declaration to all his loving subjects for Liberty of Conscience.” By this declaration, the King suspended the execution of all the penal statutes, passed for enforcing conformity to the established religion; dispensed with the oaths of supremacy and allegiance, and the several tests, which had been imposed by two acts of parliament in the preceding reign; and absolved all non-conformists and recusants

from every kind of forfeiture, which they had incurred by their non-conformity. This measure, as might have been foreseen, gave extreme offence to his Protestant subjects ; some reprobated it, as an open violation of the constitution ; others were alarmed by it, as an insidious attempt to undermine the Protestant establishment. This was followed by other measures, of a character equally suspicious, and still more offensive, which contributed to increase the universal ferment. In the following year, the King published a second declaration, enforcing the former, and giving an account of many important changes, which he had made in the civil and military departments of the state, with a view to carry his intentions into effect. An order from the Privy Council was immediately issued, by which the Bishops were required to distribute the royal declaration, and the clergy commanded to read it in all churches and chapels throughout the kingdom.

The heads of the church, being thus commanded to join in a measure, which had given general offence, held a meeting at Lambeth Palace, for the purpose of deliberating on the best course to be adopted. The Primate, and seven Bishops attended, with many other

distinguished members of the church ; among whom, the principal were Tillotson, Stillingfleet, Patrick, and Sherlock. The business was opened with prayers ; after which, they discussed together the nature and tendency of the declaration. On the most mature deliberation, they agreed in opinion, that the declaration was illegal, being grounded on the assumption of a dispensing, or, rather, of a repealing, power ; and that such a power had been adjudged in Parliament to be illegal. They also considered the declaration to be levelled against the interests of the Church and the Protestant religion. They resolved, therefore, unanimously, not to comply with the order ; and to represent to the King, in a respectful petition, the grounds upon which they felt themselves obliged to decline.

A petition was drawn up, and addressed to the King, under the signatures of the Bishops, in the following terms : —

“ To the King’s Most Excellent Majesty.

The humble petition of William Archbishop Petition.
of Canterbury, and of divers of the suffragan Bishops of that province, now present with him, in behalf of themselves and others of their absent brethren, and of the clergy of their respective dioceses ; — humbly sheweth,

that the great averseness, which they find in themselves, to the distributing and publishing in their churches your Majesty's late declaration for liberty of conscience, proceeds neither from any want of duty or obedience to your Majesty, (the Church of England being, both in her principles, and in her constant practice, unquestionably loyal, and having, to her great honour, been more than once publicly acknowledged to be so by your Majesty;) nor yet from any want of due tenderness to dissenters, (in relation to whom they are willing to come to such a temper as shall be thought fit, when the matter shall be considered and settled in Parliament and Convocation.) But, among many other considerations, it proceeds from this especially, because that declaration is founded upon such a dispensing power, as hath been often declared illegal in Parliament, and particularly in the years 1662 and 1672, and in the beginning of your Majesty's reign; and in a matter of so great moment and consequence to the whole nation, both in church and state, your petitioners cannot in prudence, honour, or conscience, so far make themselves parties to it, as the distribution of it over the nation, and the solemn publication of it in the time

of divine service, must amount to, in common and reasonable construction."

On the evening of the day in which this petition was drawn up, all who signed it, excepting the Archbishop, (who had been forbidden the court about two years before,) went over from Lambeth to Whitehall, to present it to the King. They were immediately admitted into the private chamber of the King; and there upon their knees, they delivered their petition.* The King opened it, read it over, and folding it up again, said, "This is a great surprise to me: here are strange words. I did not expect this from you,—especially from some of you. This is a standard of rebellion." The Bishop of St. Asaph, and some of the rest, replied, "that they had adventured their lives for his Majesty, and would lose the last drop of their blood, rather than lift up a finger against him." "I tell you," repeated the King, "this is a standard of rebellion." "Rebellion, Sir?" said one of the Bishops, falling down on his knees, "I beseech you, say not so hard a thing of us."

* The account, here given, of the interview between the King and the Bishops, is extracted from Dr. D'Oyley's *Life of Archbishop Sancroft*, and from the *Earl of Clarendon's State Papers*, vol. ii. appendix, p. 287. *et seq.*

“ We rebel ? Sir,” said another, “ we are ready to die at your feet.” “ Sir,” said the Bishop of Bath and Wells, “ I hope, you will give that liberty to us, which you allow to all mankind.” And the Bishop of Peterborough, with a more dignified, but not less respectful manner, addressed the King thus : “ Sir, you allow liberty of conscience to all mankind : the reading of this declaration is against our conscience.” The King said, that he would keep their paper ; that it was the strongest address which he had ever seen, and tended to rebellion. “ Do you question my dispensing power ? Some of you here have printed and preached for it, when it was for your purpose.” The Bishop of Peterborough replied, that what they had said of the dispensing power, referred only to what had been declared in Parliament. “ The dispensing power,” said the King, “ was never questioned by the men of the Church of England.” The King, again insisted on the tendency of the petition to rebellion, adding, “ I will have my declaration published.” Upon this, one of the Bishops said, “ We are bound to fear God, and honour the King : we desire to do both. We will honour you : we must fear God.” And another,

nearly to the same effect — “ We will do our duty to your Majesty in every thing to the utmost, which does not interfere with our duty to God.” — “ Is this what I have deserved of you? I, who have supported the Church of England, and will support it. I will remember you, that have signed this paper. I will keep this paper. I will not part with it. I did not expect this from you, especially from some of you — I will be obeyed in the publication of my declaration.” “ God’s will be done !” said a Bishop. “ What is that?” asked the King. “ God’s will be done !” replied the Bishop. “ If I think fit to alter my mind, I will send to you. God has given me this dispensing power : and I will maintain it. I tell you, there are seven thousand men, and of the Church of England too ; who have not bowed their knees to Baal.” With these words, the King dismissed the Bishops from his presence. The petition was within a few days afterwards approved by many of the Bishops, who had been prevented from attending at the meeting ; by the Bishops of London, Norwich, Gloucester, Sarum, Llandaff, Worcester, Winchester, and Exeter.

The business continued in this state for some days ; when at length, after an interval of about

a week, the Archbishop was summoned by an order from Lord Sunderland, the principal Secretary of State, to appear in person before the King in Council, there to answer charges of misdemeanor. At the appointed time, the Archbishop and six Bishops attended, and were admitted into the council chamber. The Lord Chancellor Jefferies, then taking a paper from the table, and showing it to the Archbishop, enquired of him, whether that was the petition which he had signed, and which the Bishops had presented? "Sir," said the Archbishop, addressing himself to the King, "I am called hither as a criminal, now for the first time, and little did I think that I should be so called, especially before your Majesty. But since it is my unhappiness to be so, at this time, I hope your Majesty will not be offended, that I am cautious of answering questions. No man is obliged to answer questions that may tend to the accusing of himself." "Chicanery!" said the King, "Chicanery!" "The Archbishop, I hope, will not deny his own writing." The Archbishop requested, that he might not be pressed to answer. The King still demanding an answer with some impatience, the Archbishop said, that although they were not obliged to give any answer to

the question, yet, if his Majesty would lay his command upon them, they would answer, trusting to his royal justice and generosity, that they should not suffer for their obedience, as they must, if the answer should be brought in evidence against them. "No," said the King, "I will not command you. If you will deny your own hands, I know not what to say to you." They were then commanded to withdraw; and after a few minutes, called in again. The Lord Chancellor said, the King had commanded him to require an answer to the question, whether the signatures on the petition were the writing of the Bishops? The King himself also commanded them to give an answer. Upon which, the Archbishop and Bishops acknowledged their writing, and that they delivered the petition. They were again commanded to withdraw; and after a short interval, again called back. The Lord Chancellor then informed them, that it was the King's pleasure, that they should be proceeded against for their petition; that the proceedings should be with all fairness in Westminster Hall, by information; and that, in the mean time, they must enter into a recognizance. To this, the Archbishop answered, that, without entering into a recognizance, they

should be ready to appear and answer. The King declared, that he offered the proceeding by recognizance as a favour, and he advised them not to refuse it. One of the Bishops answered, that whatever favour his Majesty might vouchsafe to offer, he would graciously allow either to be accepted or declined: that they conceived the entering into recognizance might be prejudicial to them; and, therefore, hoped, that his Majesty would not be offended at their declining. After some pressing by the Lord Chancellor, and unwillingness expressed on the other side, the Bishops insisted, that there was no precedent, in such a case, of a Peer of Parliament being bound by a recognizance; and they desired to be proceeded against in the common way. This was refused; and they were a third time ordered to withdraw.

On being recalled, they were again pressed to enter into a recognizance, and again declined, insisting on their privilege of Parliament. They were then finally commanded to retire: and a warrant was issued, signed by fifteen Privy Counsellors, for committing the Archbishop and Bishops to the Tower, as the writers and publishers of a

sedition libel against the King and the Government. Upon this warrant they were committed to the Tower, and the Attorney-General received orders to proceed against them by a criminal information.

The contents of the petition having transpired, and the summons of the Bishops to attend at Whitehall being also publicly known, great crowds of people thronged about the palace, awaiting with anxiety the result of the interview. But when at last they saw the petitioners led forth in custody, and heard the unexpected news, that they were then on their way to the Tower, all in an instant were overcome with alarm and grief. They looked upon these venerable prisoners, as martyrs of the church, counted worthy to suffer in so holy a cause; and as patriots, adventuring into peril in their country's cause. The people crowded around, poured forth prayers for their safety, fell down before them, and craved a blessing from their hands. With this train of followers, the Bishops proceeded to the river side, and were thence taken in barges to the Tower, amidst frequent cries from the people, of "God save the Bishops!" "God protect the Church!" This procession, which had the appearance of a triumph,

rather than of an imprisonment, interested all hearts in the cause of the Bishops, and raised the universal feeling of the country to the highest pitch of religious and patriotic zeal.

P. 189.
Habeas
Corpus.

P. 191.

On the first day of Trinity Term, 1688, the Attorney-General, Sir Thomas Powys, applied to the Court of King's Bench, on the behalf of the Crown, for a writ of *habeas corpus*, returnable immediately, directed to the Lieutenant of the Tower, commanding him to bring up the Lord Archbishop of Canterbury, and the Bishops of St. Asaph, Ely, Chichester, Bath and Wells, Peterborough, and Bristol. The Court, consisting of the Lord Chief Justice Sir Robert Wright, Mr. Justice Holloway, Mr. Justice Powell, and Mr. Justice Allybone, granted the writ. The Lieutenant of the Tower, with great dispatch, in the course of the same morning, made his return to the writ, and within two hours brought the Archbishop and Bishops into the Court of King's Bench. As numerous a procession, as before attended them from Whitehall to the Tower, now accompanied them from the Tower to Westminster Hall. The same deep interest and anxiety were felt in their cause; but, if possible, more intense, as the

moment of danger approached. The same expressions of concern and affection were uttered, not without some feeling of indignation. A large body of Peers (not less than twenty-nine, as some writers say,) attended them into Court; and such a crowd of gentry followed, that the whole Court was immediately filled. The populace stood around, filling the great hall, and spreading over the area on the outside.

The Bishops had the good fortune to be defended by the most distinguished men at the bar: Sir Robert Sawyer, who had been for many years Attorney-General — Finch, who had been Solicitor-General — Pollexfen, of great experience, who had practised in the time of Sir Matthew Hale — Sir Francis Pemberton, who had been Lord Chief Justice of the Court of King's Bench and of the Court of Common Pleas — Sir George Treby, who had been Recorder of London — Sir Creswell Levinz, who had been Attorney-General — and one other, much greater than all, who was to be the illustrious Lord Somers.

The return to the writ, by the Lieutenant of the Tower, was read on the application of the Attorney-General. It stated, that the Archbishop and Bishops had been committed,

P. 192.
The return.

and retained in custody, by virtue of a warrant under the hands and seals of the Lord Chancellor Jefferies, the Earl of Sunderland Lord President of the Privy Council, and others, who were named in the warrant, and described in the return as Lords of the Privy Council. It then set out the tenor of the writ, which purported to have been made at the Council Chamber, and commanded the Lieutenant of the Tower to take into his custody the Archbishop and Bishops, for contriving, making, and publishing a seditious libel, against the King and his Government. The return was ordered to be filed.

P. 202. The Attorney-General, after stating that the Archbishop and Bishops had been committed to the Tower, in consequence of their refusing to give recognizance for their appearance, moved, that, as they were then present in Court, an information, which was now presented against them, might be read by the officer of the Court, and that they should be called upon to plead.

P. 205-17. The Counsel for the Bishops objected to the reading of the information; insisting, that the Bishops were not regularly in Court, by due process of law, and therefore that they could not be charged with a criminal information. Sir

Robert Sawyer argued, that, by the rule of law, no man could be charged with an information or indictment, unless he came into Court by legal process ; and the practice of this and all other Courts was pursuant to such rule. That there were several processes out of the Court of King's Bench ; by *capias*, by attachment after summons, or by *venire* in the nature of a subpoena ; and that he who should come into Court upon either of these processes, might be properly charged with an information. But where a person, who had been committed by another jurisdiction, and not by the authority of that Court, was brought into it by a writ of *habeas corpus*, the first thing to be done was to enquire, whether he had been legally committed ; and to that end the return must be filed, and the party have liberty to make his exceptions. In the present case, the Bishops had been committed for a misdemeanor in making and publishing a libel ; - but this commitment was illegal ; for, being Peers of the realm, they ought not to have been committed for such an offence.

Sergeant Pemberton insisted on the same objection ; and took a fresh exception, that the Bishops had been committed, as appeared from the return, by certain persons,

Lords of the Privy Council ; but the return did not say, that the commitment was by them as Lords of the Privy Council, which can only be in council ; for except in council, said Pemberton, they had no power to make a warrant for the commitment of any person.

Form of
return.

This last objection, as to the formal defect in the return, or the warrant, was the first in order ; and was discussed, before the other, at great length. The counsel for the Crown insisted, in answer, that the Court would not examine the matter of the commitment ; and that when any person is brought into Court, let him come how he will, he is compellible to appear *instantly*, and to be charged with an information. Without giving any direct answer to the objection, they pressed to have the information read in Court, and that the Bishops should plead to it *instantly*. One of the Judges (Allybone) suggested this answer ; that the return was such as the warrant justified ; that the Lords of the Council do not describe themselves in warrants as Privy Counsellors ; but they are known to be such, as a Judge is known to be the Judge of a Court, though he only writes his name, without making any addition as to his office. And, as a warrant from the Lord Chief Justice, said he, is sufficient, without the addi-

tion of the *title* of Lord Chief Justice ; so in this case, the commitment by the Lords of the Council, the parties named, is sufficient, though they are not specified to have been assembled in Privy Council.

The counsel for the Bishops then resumed the argument ; and with reference to the case put by the Judge (Allybone), they admitted that a commitment by Sir Robert Wright, without the addition of his office as Chief Justice, would be a regular commitment, and a return in the same form would be a good return, because he is Chief Justice all over England ; yet that Lords of the Council, unless assembled in council, have not any authority to commit, whether single, or all together ; that their authority is confined to the Privy Council ; and that it ought therefore to appear from the return, that they made the warrant in council. The authority of the Chief Justice attends him into every part of England, but the authority of the Privy Counsellors is limited to the particular sphere of the Privy Council. The same Judge (Allybone) replied, that such public persons, in such public acts, can never be presumed to act in their separate or private capacities. On this, Finch suggested, that there must not

be a presumption on either side; and that the Court would judge of the sufficiency of the return, from examining the return itself, without resorting to presumptions.

P. 212-17. After renewed discussion, and a very desultory argument, the Judges gave their opinions *seriatim*. Mr. Justice Powell said, that the case was one of such great weight, and affected so closely the liberties of the noble and reverend Lords — peradventure a greater or weightier cause had not been agitated in that Court in any age — and the question had come so suddenly upon them, that he thought it would be fitter to consider a little of this matter; and consult the precedents of returns. Without looking into precedents, he would not take upon himself to say, whether the return was sufficient.

P. 217. Allybene J. admitted, that the Lords of the Council separately had no power to commit, but that every commitment must be presumed to be pursuant to the power of the person committing; and when the Lords of the Council granted such a warrant as this, it must be presumed to be according to the power which they have, not according to the power which they have not.

Holloway J. said, it was a thing so no-

toriously known to all the kingdom, that the Bishops were sent to the Tower by the Council, that nobody could doubt it; and he therefore held the warrant and return, to be sufficient. The Lord Chief Justice delivered a short opinion, stating, that he found no fault either with the return or with the warrant.

The first objection was now started afresh, P. 218. that the Bishops could not be legally committed for writing and publishing a libel, being Peers of Parliament. "It is true," said Pemberton, "in the case of treason, felony, or *breach of the peace*, the Peers have not such a privilege, and may be committed; but for such a misdemeanor as this appears to be from the warrant of commitment, they ought not to be committed; and the commitment being illegal, the Bishops ought to be discharged."

Sir Robert Sawyer, with great force, pressed the same objection; "If," said he, "this warrant is used as process, to bring the Bishops into Court to answer an information, our answer is, that no such process can by the law be taken out against the persons of Peers for *bare misdemeanors*. I agree, that for felony, or treason, or *surety of the peace*, the

persons of Peers may be committed*; and that which is called *surety* of the peace in our books, (as Mr. Solicitor well knows,) is in some of the Rolls of Parliament called *breach* of the peace; but it is all one. The meaning in short is, that it is such a *breach* of the peace, for which a man by law may be obliged to find *sureties* for the peace. If it should mean a breach of the peace by *implication*, as all trespasses and misdemeanors are said to be *contra pacem* in the indictment or information, then it were a simple thing to enumerate the cases, wherein privileges do not lie; for there could be no information whatsoever, but must be *contra pacem*, and so there could be no such thing as privilege at all. And besides, we say, the very course of this Court is contrary to what they would have; for in the case of a Peer, for a misdemeanor, you go first by summons, and then you do not take out a *capias* as against a common person, but the next process is a

* The authority cited by Sir Robert Sawyer, and commonly referred to, on the subject of privilege of Parliament, is a passage in the 4th Inst. p. 25: where Sir E. Coke lays down, that "Privilege of Parliament in informations for the King, generally the privilege of Parliament holds, unless it be in three cases, namely, treason, felony, and *the peace*."

distringas, and so *ad infinitum*. If there be any information against the Bishops," he said in conclusion, "they are ready to enter their appearance, to answer it according to the course of the Court; but if the information be for no other thing, than what is contained in the warrant of commitment, then their persons ought to be privileged from commitment."

On the other side the counsel insisted, that the writing and publishing of a seditious libel was such a breach of the peace, as required sureties of the peace; and in support of this proposition, they cited Hicks's case, from Popham's Rep. (p. 139,) and from Hobart's Rep. (p. 215); from which it would appear to have been held in the Star Chamber, in the reign of James I., that a letter addressed to Sir Baptist Hicks, and delivered into his hands, insulting him in terms of irony, was a provocation to a challenge, and a *breach of the peace*. They cited also the case of Lord Lovelace, and that of Lord Pembroke; (which, however, were cases of apparent and *actual* breaches of the peace, and, upon that ground, distinguished from the case now before the Court.)

The Judges then delivered their opinions; P. 229. and though they are not very clearly or dis-

tinctly expressed, it may be the most convenient course to state them at length, as they are to be found in the report.

Allybone J. said, The single question now is, whether or not that which Mr. Solicitor was pleased to name as the crime, and lay it to the charge of my Lords the Bishops, (that is, a seditious libel,) be a breach of the peace? I do confess, that there is little of argument to be drawn from forms of indictments; and I shall put no great stress upon the words, *vi et armis*, where the fact will not come near it; but if a commitment may ensue, (as they seem to agree,) wherever *surety of the peace* may be required, nothing seems more important to me, than that surety of the peace should be required, where there is any thing of sedition in the case; and wherever there is a seditious act, I cannot tell how to make any other construction of it, but that it is an *actual breach of the peace*. That is my opinion.

Powell J. said, I am of the same opinion in this point too, as I was in the other point before. It was a matter of great consequence, I thought, upon the former point; but now it appears to me, to be of far greater consequence, than it did at first. For here, all the great, high, and noble Peers of England are

concerned in it, as to their privileges. Our predecessors in this Court would not determine the privileges of the Peers, but left them to themselves, to make what judgment they pleased of them. I think truly it is a thing of that weight, that it may be very fit for the Court to take time to consider of it; and I declare, for my own part, I will not take upon me to deliver any opinion in a matter of this consequence, before I have consulted all the books, that can give me any light in the case.

Allybone J. again: I am not determining, limiting, or cramping the privilege of Peers, but I am only considering, whether or no a seditious libel be a *breach of the peace*. Is there any thing, that will require sureties of the peace, to be given upon doing it? For there Sir Robert Sawyer has laid the foundation of his distinction; and if that should draw any person under a commitment, then, say I, in my judgment, wherever there is a seditious libel, there is that which is an actual breach of the peace; and I am sure, there is that which is sufficient to require *sureties of the peace*. I controvert not the right of the Peers one way or other, but only declare my opinion, that this is a fact, that comes within the rule laid down by them;

and what will require sureties of the peace, is a breach of the peace.

Holloway J. God forbid, that, in any case of this nature, any one should take upon him here to say, that every misdemeanor is a breach of the peace. I say not so; but, certainly, there are some such misdemeanors, as are breaches of the peace; and if here be such a misdemeanor before us, then it is acknowledged, that even in parliament-time, a privileged person may be committed for it. For in treason, felony, and *breach of the peace*, privilege does not hold. I will not take upon me, as my Brother said, to determine concerning the privilege of the Peers. It is not of our cognizance, nor have we any thing to do, either to enlarge or confine privilege; nor do we determine, whether ~~this be~~ such a libel, as is charged in the information. That will come in question another time; but, certainly, as this case is, the information ought to be read, and my Lords ought to appear, and plead to it.

The Lord Chief Justice. Certainly, we are all of us here as tender of the privileges of the Peers as any in the world can be, and as tender as we would be, and ought to be, in trying any man's rights. It becomes us to do

it with great respect and regard to my Lords the Bishops. And, therefore, I would be as careful, if that were the question before me, to consider very well, before I give my opinion, as ever I was in my life. But where I see there can come no mischief at all to the privileges of the Peers, by what is agreed on all hands, I think I may very justly give my opinion. For here is the question, whether the facts, charged in the warrant, be such a misdemeanor, as is a *breach of the peace*? And the words of the warrant, which is now upon the record, being such as have been recited, I cannot but think, that it is such a misdemeanor, as would have required *sureties of the peace*; and if sureties were not given, a commitment might follow. Therefore, I think, the information must be read.

The Clerk of the Court began to read the information in English; when he was directed by the Solicitor-General to read it, as it was, in Latin. The Bishop of Peterborough requested, that it might be read in English, as they did not understand Law-Latin. "No," replied the Solicitor-General, "my Lords the Bishops are very learned men, we all know: read it in Latin." The information was accordingly read in its genuine legal latinity. P. 230.

P. 231.
Informa-
tion.

The information averred, that the King had, in the preceding year, published, under the great seal, and caused to be printed, a declaration for liberty of conscience. In this declaration, the King announced his royal will and pleasure, that the execution of all penal laws in ecclesiastical matters should be immediately suspended; that the oaths of supremacy and allegiance, and the several tests enjoined by the Acts of the 25th and 30th of Charles the Second, should not be required of any person on entering into an office or place of trust; that any who had omitted to take the oaths, should be exempted from penalties and forfeitures; and that a full pardon should be granted to non-conformists and recusants, who had done any act contrary to the penal laws relating to religion. The information then set out another declaration of the King, confirming the former, and an order by the King in council, commanding that the declaration should be read, at appointed times, in all churches throughout the kingdom. The information proceeded to aver, that, after the making of such order, on the 8th of May, at Westminster, the said Archbishop and Bishops unlawfully consulted and conspired to lessen the regal authority and pre-

rogative, and to break the said order; and that, in prosecution of the said conspiracy, at Westminster, they unlawfully, maliciously, and scandalously made, composed, and wrote, and caused to be made, composed, and written, a certain false, feigned, pernicious, and seditious libel in writing, of and concerning the King, and of and concerning the said declaration and order; and that they published and caused to be published the same, subscribed with their hands, in the presence of the King. The information then set out the writing, alleged to be a seditious libel, which was in the form of a petition from the Archbishop and Bishops, in behalf of themselves, the other Bishops, and the Clergy at large. This petition has been before stated.

When the information had been read, the Attorney-General moved, that the Archbishop and Bishops might be called upon to plead to it. Their counsel resisted this, maintaining, that the Bishops ought to have a reasonable time to plead, as the warrant of commitment was general, and as they had not received any previous notice of the contents of the information. They made a distinction between the case of a person brought into court in custody in the first instance, and the case of

P. 240.
Time for
pleading.

one who comes into court by writ of *capias*, upon default of appearing to summons. In the latter case, they admitted, the party might be called upon to plead *instantly* to an information for a misdemeanor; but they insisted, that in the former, the regular practice was to allow time for pleading. This, they urged, was a reasonable and sound distinction, and well warranted by the established practice of former times. The counsel for the prosecution, on the other hand, referred to the modern practice, in support of their application.

The Court inquired of the Master of the Crown Office upon this point of practice. He stated, that, according to the practice of the preceding twelve years, during which he had been in office, any person appearing on recognizance, or taken on a warrant of the Chief Justice or of a Justice of the Peace, or brought before the Court by any other means in custody, or any officer of the Court that is a privileged person, and who must appear *in propria persona*, ought to plead *presently*, unless the Court should think right, under the circumstances of the case, to grant time; and he had understood, that the practice was the same, in the time of his predecessor, and for a period of sixty years.

But this statement as to the ancient practice, P. 245. was strenuously denied. "Mr. Pollexfen, and the practisers in Lord Hale's time," said Finch, one of the counsel for the defendants, "will inform the Court, that the practice was different in his time." "I remember the time very well," said Pollexfen, "I remember, when I, and some others at the bar, wondered to see this practice coming on, and thought it a hard and mischievous thing. In truth, the several plots that have been, and the heats of men about such things, have brought in this course. Certain I am, and I dare affirm, there never was any such course here before. Neither upon warrant from the Chief Justice, nor upon recognizance, nor upon any other process, was a man compelled to plead instantly, without having a *capias* in the regular form, after a contempt for not appearing upon summons. We had no interest in the matter one way or other, (continued Pollexfen,) otherwise than as we were concerned, that the law and justice of the nation should have its true and ancient current. And this I can assure the Court, that here was my Lord Chief Justice Saunders, and Mr. Sergeant Holt, and myself, who taking notice, when this was first attempted,

(to make a man plead immediately,) could not but say among ourselves, that it was an unreasonable thing; and we were inclined to speak to the Court, to inform them of the consequence, which must needs be very mischievous. If any such thing appear to have been done and practised anciently, I will submit, and say I am under a mighty mistake. But if this, which is now urged for the course of the Court, is nothing but what the zeal of the times, and heat of prosecutions, have introduced, surely that is not fit to be a constant rule for the Court to go by. For every one knows, that the zeal of one time may bring in that by surprise upon one man, which, when things are cool at another time, will appear to be plain injustice. We have, indeed, seen strange things of this kind done before: but I hope to God, they are now at an end, and we shall never see any such things done hereafter." He proceeded to argue very forcibly against the motion of the Attorney-General, on the ground, that it would produce extreme hardship and inconvenience to the party accused; and concluded with entreating the Court, that the question might be adjourned to the following morning, to allow of an opportunity for searching into precedents.

Sir Robert Sawyer insisted on the distinction, which had been taken; and argued, that when a party has been summoned to appear to an information, and makes default, upon which a *capias* issues, the party, brought into court by the *capias*, must plead immediately; but when a party is brought into court upon a commitment in the first instance, and an information is put in at the moment, in such case he ought not be compelled to plead *instante*. "If," said he, "they can show any one precedent of this kind fifteen years ago, I would be contented to yield, that they are in the right; but I am sure they are not able to do it. In Sir Matthew Hale's time, when this was moved, it was refused; and he was clearly of another opinion. To indictments for treason and felony he shall be compelled to plead presently, but not to an information for misdemeanors."

Mr. Justice Powell observed, that it would be hard, if the party should be compelled. To this the Attorney-General answered, "There are many things, which seem hard in law; but yet, when all is done, the Judges cannot alter the law. It is a hard case, that a man, tried for his life for treason or felony, cannot have a copy of his indictment, cannot

have counsel, cannot have his witnesses sworn; but this has been long practised, and the usage is grown to a law; and, from time to time, it hath been so taken for law; it cannot be altered without a new law made; as it hath been heretofore, so it must be now, till a greater authority alter it. So, as to the case at present, if it were a new case, and it was the first instance, I must confess, I think I should not press it; but if this be the constant practice of the Court, and if these gentlemen who now oppose it, have some of them ministerially, some of them judicially, themselves established this practice, they have no reason to wonder that we follow them in it.

P. 249. The Solicitor-General argued, that the practice had been, for at least ten years, as now contended for: that if the cause, now proposed, is a trick — as it has been called by the counsel for the Bishops — to rob men of their just defence, those counsel ought not to forget, who first taught the trick. It would not be reasonable to grant an imparlance to Michaelmas term, which must be the consequence, if this objection were to prevail. The Bishops must be glad to remove the imputation now upon them, and this would best be done by a speedy trial. For his own part, (continued the

Solicitor-General) if this were his own case, he would have the cause tried immediately.

The Court inquired again of the clerk of the Crown Office, as to the regular practice in cases like the present: who gave the same answer as before. "But," asked Mr. Justice Powell, "what do you say to the difference that was taken, between a person brought in custody in the first instance, and a person who comes here by *capias* upon default of appearing at the summons? Methinks, it seems very reasonable, that this forcing a man to plead presently, should be only a punishment for a contempt of Court. The Bishops were not in contempt. If they had been served with a *subpœna*, and had not appeared, then there would have gone out a *capias* to bring them in, and they would have come in upon contempt, and so would have been within the rule."

The Court a third time referred to Sir Samuel Astry and two other officers in the Crown Office; who stated, that for ten or twelve years the practice had been, that any person brought into court in custody, and charged with an information, must plead immediately. On which the Solicitor-General observed, "In these twelve years we have

had many changes in court; perhaps there may have been twelve Chief Justices and more, with other Judges; and they have all affirmed and allowed this course."

The counsel for the Bishops again pressed for time till the following morning, for the purpose of examining precedents. "Would the course of the Court," said the Lord Chief Justice, "be otherwise to-morrow, than it is to day? We have taken all the care we can, to be satisfied in this matter; and we will take care, that the Lords the Bishops shall have all justice done them; nay, they shall have all the favour, by my consent, that can be shown them, without doing wrong to my master the King. But truly I cannot depart from the course of the Court in this matter, if the King's counsel press it." The Attorney-General pressed for the judgment of the Court. The Lord Chief Justice declared his opinion, that the Bishops ought to plead to the information.

P. 267.
Plea. The Bishops were now called upon to plead. The Archbishop, on behalf of himself and the Bishops, tendered a written plea; pleading, that they were Peers of England, and Lords of Parliament; and that, as such, they ought not to be called upon to answer *instantly*

to the information, but ought to be required to appear by due process of law, and, upon their appearance, ought to have a copy of the information, and reasonable time to imparle. The counsel for the Crown insisted, that the question, arising on this plea, had been already argued and determined; and that the plea should be rejected, as frivolous. Mr. P. 274. Justice Allybone said, he did not know what power the Court had to reject a plea: but if they had such power, this plea ought to be rejected. Mr. Justice Powell said, although the same matter had been before argued by way of motion; yet now, as it came before the Court in the form of a plea, for their judicial determination, he thought it ought to be received. Mr. Justice Holloway said, he was not ashamed to declare, that he should be very glad and ready to do all things, consistent with his duty, to show respect to the Bishops, some of whom were his particular friends: but he was upon his oath, and must go according to the course of the law. The Lord Chief Justice said, that the Court had asked and informed themselves from the bar, whether they might reject the plea; and what they had said, had satisfied him, that they might reject it, if the plea were frivolous; and as this plea contained only

what had been already overruled after argument, the Court were not bound to receive the plea, but might reject it : the Bishops must plead over.

P. 275.

The plea of the Bishops was therefore rejected ; and each of the defendants pleaded Not Guilty. The trial was appointed to be at the bar of the court, at the end of a fortnight.

The Court proposed to take bail for their appearance : but this they refused, and offered their own recognizances, which were accepted. Something was said respecting the number of jurymen to be returned ; and forty-eight was the number fixed by the Chief Justice, as the fairest. "We agree to it," said the Attorney-General, on the part of the Crown ; "We desire nothing but a fair jury."—"And we desire nothing more," said the counsel for the Bishops ; "try it, when you will." Thus, all preliminary matters were finally arranged ; and the parties separated with a mutual defiance.

P. 277.

Trial.

On the appointed day, the 29th of June, 1688, the Archbishop and Bishops appeared in the Court of King's Bench, in conformity with their recognizances, to abide their trial. The Attorney-General, Sir Thomas Powys, opened the case on the part of the Crown. In

describing the offence imputed to the defendants, he laid down the law of libel so rigidly, as to make it impossible for any man to express his sentiments freely on the measures of government, even in the most guarded and temperate language, without incurring the peril of a criminal information. "The Bishops," he P. 281. said, "are prosecuted for censuring his Majesty and his government, and for giving their opinion in matters wholly relating to the government and to law. And I cannot omit here to take notice," added the Attorney-General, "that there is not any one thing, of which the law is so jealous, or for the prosecution and punishment of which the law more carefully provides, than all accusations and arraignments of the government. No man may say of the great men of the nation, much less of the great officers of the kingdom, that they act unreasonably or unjustly; least of all, may any man say such a thing of the King. For these matters tend to possess the people, that the government is ill administered; and the consequence of that is, to set them upon desiring a reformation; and what that tends to, and will end in, we have all had a sad and too dear-bought expe-

rience. The last age will abundantly satisfy us, whither such a thing does tend."

P. 283. The King's declaration of the 4th of April, 1687, for liberty of conscience, and a second declaration of the 27th of April, 1688, reciting and enforcing the former, were produced in evidence, under the great seal. The order of the King in Council, requiring the public reading of the declaration in all churches, was read from the Council Book, which was produced by the registrar of the Privy Council. This was followed by proof of the printing of the declarations. One of the printed declarations was proved to have been compared, and to agree, with the original; but the comparison of the other declaration was not proved. Some discussion took place upon this point; whether a strict comparison was necessary. The Court held, and very reasonably, that the proof was sufficient, and that no such nicety was required. If there had been any doubt as to the sufficiency of the proof, the original under the great seal, and the printed copy, might have been compared by the officer of the Court.

P. 286. The paper, upon which the information was founded, purporting to be signed by the Archbishop and Bishops, was then produced

by a witness, who stated, that he had received it from the hands of the King in Council. The signatures not being admitted, the Attorney-General proceeded to give evidence of the handwriting. The signature of the Archbishop was clearly proved by two witnesses, who had seen him write several times; it was further proved, that the body of the writing was also the handwriting of the Archbishop. The signature of the Bishop of St. Asaph was proved by one who had seen his handwriting.

Some difficulty occurred in proving the signature of the Bishop of Ely. The first witness, called for this purpose, named Brooks, said, he believed the signature to be the Bishop's, from having seen a letter addressed to another Prelate, which the Bishop of Ely had admitted to the witness to be his handwriting. But, on cross-examination, it appeared, that there had not been any express admission to that effect, and the witness merely inferred the admission from the single circumstance of his having had a communication with the Bishop on the substance of the letter. Mr. Justice Powell observed, that this was a strange inference for proving a person's handwriting. The Chief Justice also declared, that this was not proof of

P. 288.

Proof of
signatures.

- P. 289. the signature. Two other witnesses were then called, for the purpose of proving the Bishop of Ely's signature ; but their evidence failed. A fourth witness, however, named Middleton, had seen the Bishop write, and believed the signature to be his writing.
- P. 291. The Bishop of Peterborough's signature was next proved by a witness, who had acquired a knowledge of his handwriting from letters,
- P. 292-3. purporting to be written by the Bishop, on matters of business, which business the witness had in consequence transacted. The Bishop of Bristol's signature was proved by one who
- P. 294. had seen him write. The witnesses, who were called to prove the signatures of the Bishops of Bath and Wells, and of Chichester, would not speak positively to their belief of the handwriting.
- P. 296. After this evidence as to the signatures, the counsel for the Crown desired that the paper might be read. This was opposed by the counsel for the defendants, and a desultory argument ensued, on the subject of proof of handwriting. Sergeant Levinz urged, that nothing had been offered, but the loose opinions of witnesses, and their comparison of handwriting. Sergeant Pemberton submitted, that some written paper ought to be produced, which a

witness could swear to be genuine handwriting, and that the paper in question should be compared by the jury with that writing. But the Lord Chief Justice truly observed, that the witness is the proper person to judge of the comparison ; and if he knows the party's writing, he is to compare it in his own mind with the writing in question. The argument upon this point continued for a long time, and not without much personal altercation. The Judges then declared their opinions in order.

Mr. Justice Powell held, that the proof was P. 304. insufficient. " It is too slender a proof in such a case. I grant, in civil actions, a slender proof is sufficient to make out a man's hand ; as by a letter to a tradesman, or a correspondent, or the like. But in criminal cases, such as this, if such a proof be allowed, where is the safety of your life, or of any man's life ?"

The Lord Chief Justice was of a different opinion. " I think truly," he said, " there is proof enough to have it read ; and I am not afraid or ashamed to say it ; for, I know, I speak with the law. Say what you will of criminal cases, and of the danger of people's lives, there is more danger to the government, if such proof were not allowed to be good." — " I think," replied Mr. Justice Powell,

“there is no danger to the government at all, in requiring good proof against offenders.”

Mr. Justice Allybone was of opinion, that the evidence as to some of the signatures was of no weight; but that the handwriting had been positively proved against the Archbishop and one or two more. This (he justly thought,) would warrant the reading of the paper.

Mr. Justice Holloway held, that there ought to be stronger proof. “Certainly,” said he, “the proof ought to be stronger and more certain in criminal cases, than in civil matters. In civil matters, we go upon slight proof, such as the comparison of hands, for proving a deed or a witness’s name; and a very small proof will induce us to read it. But, in criminal matters, we ought to be more strict, and require the positive and substantial proof, that is fitting for us to have in such a case. And without better proof, I think the paper ought not to be read.” As the Court were thus divided in opinion, other proof of the signatures was required.

P. 307.

The counsel for the prosecution then called a witness, of the name of Blathwayt, one of the clerks of the Privy Council, who stated, that the Archbishop and Bishops, at the council-table, at Whitehall, on the 8th day of

June instant, owned their signatures on the petition. This witness, in his cross-examination, stated further, that the Archbishop and Bishops were asked, on their first entrance, whether they owned the paper? they answered, that they humbly hoped, if they were put to answer, no advantage should be taken against them; but that they were ready to obey the King's commands. On this, they were directed to retire. The second time they were called into the chamber, they repeated again, that they hoped, no advantage would be taken of what they said; upon which they were again ordered to withdraw. On their being called in, a third time, the Lord Chancellor Jefferies required them to answer, whether they did, or did not, own that paper? Upon which the Archbishop said, he had written it with his own hand, and would not let his clerk write it; and the Bishops owned their signatures subscribed: but at the same time they denied, that they had published its contents. After this proof, the petition was read.

One of the counsel for the defendants, P. 316.

Finch, here renewed an objection, which had been first stated by Levinz, namely, that there had not been any proof of a material averment in the information, which charged the Publication.

writing and publishing to have been *in the county of Middlesex*, nor had the publication been proved at all. The Chief Justice adverted to the proof, that the defendants had owned the paper in the county of Middlesex. But the counsel for the defendants submitted, that such an admission could not be evidence of the *place*, in which the paper had been written or published. The counsel for the Crown, on the other hand, contended, that if a person should set his name to a libellous paper, and part with the paper, which afterwards comes into the hands of the person libelled, this is a publication of the libel; and, in the absence of proof to the contrary, must be presumed to have been done by the writer himself, who at the time of the writing had the paper in his own power. The counsel for the defendants on the other hand denied, that there had been any proof, from which it could be presumed, that the King had received the paper from the Archbishop and Bishops; much less, that he had received it in the county of Middlesex. And, for the purpose of showing that the Archbishop could not have written the paper in that county, they called a witness; who proved, that the Archbishop had not once moved out of his palace

at Lambeth, from the time of the King's declaration, excepting on the occasion of his being summoned before the Privy Council.

After this, the former objection was renewed; and it was strenuously argued, that the owning of the signatures at the council-table did not amount to a publication, and could not be an admission of the *place*, where the writing was made. The Solicitor-General, Sir William Williams, still contended, that as the paper appeared in Middlesex, and had been proved to have been written and made by the defendants, it must be presumed to have come from them. But the Lord Chief Justice, Mr. Justice Powell, and Mr. Justice Holloway, were of opinion, that this could not be presumed. "I will ask my brothers their opinion," said the Lord Chief Justice; "but I must deal truly with you, I think it is not evidence against my Lords the Bishops." Mr. Justice Holloway said, "I think you have failed in your information; you have not proved anything against the Bishops in the county of Middlesex; therefore, the jury must find them Not Guilty."

The Attorney-General here remarked, that a person may take an opportunity secretly to deliver a libel to the King, when no other person

is present, and so there could be no proof of delivery. "It is a dangerous thing," answered Mr. Justice Powell, "on the other side, to convict people of crimes without proof." — "But shall a man," said the Attorney-General, "be permitted thus to affront the King, and there be no way to punish it?" — "Surely there will," answered the Lord Chief Justice. "But it will be a very strange thing, if we should presume, that these Lords did it, when there is no sort of evidence of it. It is that, which, I assure you, I cannot do. We must proceed according to evidence, and forms and methods of law. They may think, what they will, of me; but I always declare my mind according to my conscience. If there were enough to raise a doubt in the Court, so as to leave it to the jury, I would sum up the evidence." Upon this, the counsel for the Crown, though they had closed their case, attempted to prove by five witnesses, clerks of the Privy Council, that the defendants had admitted the fact of their having delivered the petition to the King; but the proposed proof entirely failed.

P. 545.

P. 552. The Chief Justice then began to sum up the evidence to the jury, and had not proceeded far, when one of the counsel for the

defendants, interrupting him, observed, that they had other matter to offer in defence. In vain did the other counsel on the same side, foreseeing the fatal consequences that might ensue on such an ill-timed interruption, entreat the Chief Justice to proceed. The Chief Justice called upon them for their evidence. "The Court will think there was something more than ordinary; therefore I will hear him. Such a learned man, as Mr. Finch, shall not be refused to be heard by me, I assure you." "My Lord," said Finch, "all I was going to say, amounted only to this, that there being no evidence against us, we must of course be acquitted." "I dare say," observed Mr. Justice Holloway, "my Lord intended to have said as much as that."

The Chief Justice was now persuaded to P. 352. proceed, and on the point of re-commencing his summing up; when the Solicitor-General, taking advantage of the interruption and delay, informed the Court, that a personage of great quality was coming to give evidence, who would make it clearly appear, that the Bishops had applied to him, to be introduced to the King, for the purpose of delivering the petition. "There is a fatality," said the Solicitor-General, "in some causes,

my Lord, and so there is in this. We must beg your patience for a very little while, for we have notice, that a person of very great quality is coming, who will make it appear, that my Lords the Bishops made their addresses to him to be introduced, that they might deliver the paper to the King." "Well," observed the Lord Chief Justice, "you now see, what comes of the interruption, gentlemen. Now, we must stay." A pause ensued for near half an hour.

P. 554. During this interval, the Attorney-General again suggested, that the paper must be presumed to have been delivered by the Bishops. But the Lord Chief Justice declared his opinion, that neither the writing, composing, publishing, or causing to be published, had been proved, as averred to have been, in the county of Middlesex. The Bishops," said the Attorney-General, "did in Middlesex confess the writing to be theirs." "But," answered the Lord Chief Justice, "the owning of the signatures is not a publication in Middlesex; and so I should have told the jury." "My Lord," replied the Attorney-General, "does it not put the proof upon them, to prove, how it came out of their hands into the King's hands?" "No," said the Lord Chief

Justice, "the proof lies on your part." Pollexfen begged, that the Bishops and the Jury might be dismissed. The Solicitor-General answered, the witness would soon arrive; and resumed the argument, as to the publishing. Mr. Justice Powell expressed his former opinion. Pemberton complained, that they stood mightily uneasy in court, and the jury also, and entreated to be dismissed. "I cannot help it," answered the Lord Chief Justice, "it is your own fault."

Another long pause occurred. Pemberton at last observed, it was very unusual to wait so long for evidence. "It is so," answered the Lord Chief Justice, "but I am sure, you ought not to have any favour." The pause continued some time longer; when the Court required it to be proved by oath, that the expected witness was coming. A person was produced, who swore, that a messenger had been sent to Lord Sunderland.

A considerable pause again took place. At length appeared the Lord President of the Council, Lord Sunderland. He stated, that two of the Bishops had applied to him, in the name of the Archbishop, and for themselves and four other Bishops, to be informed, at what time they might be allowed

to present a petition to the King; that they wished him to read the petition, but he refused. He informed the King, who expressed his readiness to receive the petition at any time. He communicated this to the Bishops, and they shortly afterwards went together into the presence of the King. "Then, I think, my Lord," said the Solicitor-General, "the matter is very plain." "Now it is upon you, truly," observed the Lord Chief Justice, addressing himself to the counsel for the defendants. "You may make your observations upon this, two hours hence. Now we shall hear what Mr. Finch had further to offer, I suppose. "Aye," said the Attorney-General, "I think; it is very plain." "Truly," said the Lord Chief Justice, "I must needs tell you, there was a great presumption before, but greater now. I think I shall now leave it with some effect to the jury."

P. 558.
Defence.

The counsel for the Bishops then entered upon their defence. Sawyer, Finch, Pollexfen, Pemberton, all spoke with spirit in this great and animating cause; justifying the conduct of the Bishops, insisting on the right of petitioning, and arguing against the legality of the dispensing power which had been assumed by the King. They denied, that there

had been a tittle of evidence to prove the charge in the information ; or that the petition of the Bishops contained a single word, which could justly be understood as trenching on the King's prerogative. The petition, (they urged,) was a most respectful apology for non-compliance with the order of the King, accompanied by an earnest entreaty, on behalf of themselves and the whole body of the clergy of England, that he would not insist on their reading the declaration ; the dispensing power, on which it was founded, having been frequently declared in Parliament to be contrary to law. Commanded by the Crown, to do what they conceived to be against law and conscience, they humbly stated the reason, why they could not, consistently with duty, submit to his Majesty's command. To make this representation to the King, was the bounden duty of the Bishops, as Peers of the realm, as guardians of the act of uniformity, as fathers of the church. They had done this, in a manner the most becoming, not obtrusively or publicly, but craving leave to approach his royal person, and presenting their petition privately to the King, with the utmost decency and respect. This could never deserve

to be degradingly called the publication of a malicious and seditious libel ; nor could it be justly said to have been done with an intent to excite sedition, or to alienate the hearts of the people from the government.

“ By this declaration,” said Sawyer, “ not only the laws of our reformation, but all the laws for the preservation of the Christian religion, are suspended, and become of no force ; if, indeed, there be such an effect in the declaration, as is pretended, that is, if the obligation to the existing laws at once ceases.”

“ A power to abrogate laws,” said Finch, “ is as much a part of the legislature as a power to make laws : a power to lay laws asleep, and to suspend laws, is equal to a power of abrogation : both are equally parts of the legislature : and, by the law of the land, the legislative power resides not in the King alone, but jointly in the King, Lords, and Commons. This assumed power of suspending the laws, was never attempted before the time of Charles II. ; till then, it was never pretended ; and in that first attempt, it was so far from being acknowledged, that it was noticed by Parliament in 1662 and 1672, and then declared to be illegal.”

The spirit of the ancient Pollexfen grew warm with his subject: "Can any thing be more humble," said he, "or done with a more Christian mind, than this mode of petition, to inform the King in the matter? For I never thought it, nor hath it ever sure been thought by any body else, to be a crime to petition the King. The King may be mistaken in the law, — so our books say: and we every day in Westminster Hall argue against the King's grants, and say, he is deceived in his grants. It is the great benefit and liberty, which the King gives to his subjects, to argue the legality or illegality of his grants."

"The Kings of England," said Pemberton, "have no power to suspend or dispense with the laws of the kingdom. Such a dispensing power is a thing that strikes at the very foundation of all the rights, liberties, and properties of the King's subjects. If the King may suspend the laws of England, which concern our religion, there is no other law but he may suspend. And if the King may suspend all the laws of the kingdom, what a condition are all the subjects in, for their lives, liberties, and property. All are in mercy!"

The evidence, produced on the part of the Bishops, consisted of ancient records, declara-

P. 374.

tions by the Crown to Parliament, and addresses by the Lords and Commons; from which it might be inferred, that the King did not legally possess the assumed power of dispensing with the laws. This evidence was free from all objection, and properly admitted; for it was offered, not for the purpose of proving any matter of *fact*, stated in the supposed libel, and charged as libellous, but only to establish a proposition of *law*, on a question of prerogative.

P. 396.

At the close of this evidence, Levinz and Finch entered at large into the general question. They were followed by the junior counsel, afterwards the illustrious Lord Somers, who distinguished himself by a speech, of less length, but far more pointed and more striking, than any that had been delivered. He concluded with these words: "My Lord, as to the matters of fact alleged in the petition, — that they are perfectly true, we have shown by the Journals of both Houses. In every one of those years, which are mentioned in the petition, this power of dispensation was considered in Parliament, and, upon debate, declared to be contrary to law. There could be no design to diminish the prerogative, because the King hath no such prerogative.

Seditious it could not be, nor could it possibly stir up sedition in the minds of the people, because it was presented to the King in private and alone. False it could not be, because the matter of it is true. There could be nothing of malice, for the occasion was not sought; the occasion was pressed upon them. In a word, a libel it could not be, because the intent was innocent, and they kept within the bounds set by the Act of Parliament, which gives the subject leave to apply to his Prince by petition, when he thinks himself aggrieved."

The Attorney-General and Solicitor-General spoke at some length in reply, arguing broadly in support of the dispensing power of the Crown, and insisting that the Bishops were not justified in petitioning the King out of Parliament, and that they had been guilty of a libel in questioning the King's prerogative. Reply.

The Solicitor pushed his arguments against the right of petitioning, and in support of the dispensing power of the King, much beyond the Attorney-General, and was interrupted by the Court. "This," said Mr. Justice Powell, "is a strange doctrine! Shall not the subject have liberty to petition the King, except in Parliament? If that be law, the subject is

in a miserable case.”—“Let him go on,” answered the Lord Chief Justice, “we will hear him out, though I approve not of his position.” The Solicitor-General persisted in the same strain, though checked at one time by the Lord Chief Justice, who desired him to come close to the business; and at another time by Mr. Justice Powell, who remarked that “he was shooting at ravens.”—“I will not interrupt you,” said the Lord Chief Justice, “but pray come to the business before us. Show us, that this is in diminution of the King’s prerogative, or that the King ever had such a prerogative.” Upon which the Solicitor-General observed, that the Bishops, in declaring it to be inconsistent with their honour and conscience to do what the King required them to do, had reflected upon the King and the Government. He concluded by calling upon the jury to give a verdict for the Crown.

Mr. Justice Holloway here observed, he was not satisfied upon the point, which the counsel for the Crown had argued, that the Bishops had no power to petition the King. “Out of Parliament they cannot,” replied the Solicitor. “But,” said Mr. Justice Holloway, “if the King, after making such a declara-

tion of a general toleration and liberty of conscience, require the Bishops to disperse it abroad ; and if they, out of a tenderness of conscience, cannot comply, because they apprehend it to be contrary to law, and contrary to their functions ; what can they do, if they may not petition ?” “ They should have acquiesced,” replied the Solicitor, “ till the meeting of Parliament. It is one thing, for a man to submit to his Prince, if the King lay a command upon him that he cannot obey, and another thing to affront him. If the King will impose upon a man what he cannot but do, he must acquiesce ; but shall he come and fly in the face of his Prince ? Shall he say it is illegal ? or, that the Prince acts against prudence, honour, and conscience ? and thus throw dirt in the King’s face ? This is not permitted ; it is libelling.”

The Lord Chief Justice expressed his opinion, that although the Bishops might petition the King, as he thought they might, yet they ought to have done so in another manner : for if they might in so reflecting a way petition the King, it would make the Government very precarious.”

After the Attorney and Solicitor-General, another counsel on the part of the Crown,

Sergeant Baldock, made a feeble speech : admitting the right of the subject to petition the King, but objecting to the manner in which the Bishops had petitioned. "Whether," said he, "they should have meddled with this, in this manner, is the question : their consent and approbation were not required : they were only desired to read it. More gentle reasons should have been given for their averseness to read it : more gentle and other kinds of reasons than those, which they had given."

The Recorder, Sir Bartholomew Shower, next rose : "Will your Lordship please to spare me one word?"—"I hope," said the Lord Chief Justice, "we shall have done by and by."—"If your Lordship does not think fit, I shall sit down."—"No, no," replied the Lord Chief Justice, "go on, Sir Bartholomew Shower, or you will say I have spoiled a good speech."—"I have no good one to make, my Lord;" said Sir Bartholomew, "I have only a very few words to say."

As Sir Bartholomew Shower sat down, another sergeant, Sergeant Trinder, rose. "What, another?" said the Lord Chief Justice, almost in despair, "how unreasonable now is

this, that we must have so many speeches at this time of day ! but we must hear it ! Go on, brother." Sergeant Trinder admitted, that if the power of suspending laws was not warranted by law, the Bishops had not offended ; but he claimed for the King the prerogative of suspending and abrogating laws in the most plenary and absolute manner. Here ended the speeches and arguments of the counsel for the prosecution.

The Chief Justice, in summing up the case, declined giving any opinion on the great constitutional question, so much discussed by the counsel, whether the Crown could legally dispense with an existing law ; a question, on which, as he thought, the Court were not called upon to pronounce its judgment. He said, there were two questions to be determined ; one, a question of fact, as to the publication of the paper by the Bishops ; the other, a question of law, whether the paper, if published, was a libel. On the former, he recapitulated the evidence of publication. On the latter point, he stated to the jury, that any thing which should disturb the Government, or make mischief and stir among the people, was within the case *de libellis famosis* ;

P. 422.
Summing
up.

and he added, "I must in short give you my opinion, I do take it to be a libel."

Mr. Justice Holloway said, "The question is, whether this petition of the Bishops be a libel? Now, the end and intention of every action is to be considered; and we are to consider, in this case, the nature of the offence, with which these noble persons are charged. It is for delivering a petition, which was done with all humility and decency. If you are satisfied, that there was an ill intention of sedition, or the like, you ought to find them guilty; but if you find only, that they delivered the petition to save themselves harmless, and to free themselves from blame, by showing the reason of their non-compliance with the King's command, which they apprehended to be a grievance to them, and which they could not in conscience obey, I cannot think it is a libel. It is left to you, gentlemen, but that is my opinion."

P. 425.

Mr. Justice Powell began by observing, that he could not see any thing of sedition, or any thing criminal, fixed upon the reverend Fathers, the Bishops. After adverting to the language of the petition, and the manner in which it was presented, he observed,

that he knew of no authority in the law, which warranted the assumption of a dispensing power; and, if no such power was vested in the Crown, the petition, which the Bishops presented to the King, could not be a libel, in merely asserting, that the declaration, founded on such a pretended power, was illegal. This dispensation amounts to an abrogation and utter repeal of all the laws; for I can see no difference between the King's power to dispense with laws ecclesiastical, and a power to dispense with any other laws whatsoever. If this be once allowed, there will need no Parliament: all the legislature will be in the King, which is a thing worth considering. I leave the issue to God and your consciences.*

Mr. Justice Allybone delivered an opinion, which was the last, probably, of the kind, delivered from the English bench. "No man," said he, "can take upon him to write against

* The conscientious and upright conduct of the two judges, Holloway and Sir Thomas Powell, gave offence to the King. They were removed from the Court of King's Bench before the following Michaelmas Term, and were succeeded by Sergeant Stringer, and Sergeant Baldock, the latter of whom had been counsel against the Bishops. See 3 Mod. Rep. 240.

the actual exercise of the Government, unless he have the leave of Government ; but he makes a libel, be what he writes true or false. No private man can justify taking upon himself to write concerning the Government. For what has any private man to do with Government, unless his interest be shaken ? It is the business of subjects, to regard their own property and interests. What has he to do with matters of Government ? they are not within his sphere." He concluded by denouncing the petition as a libel.

Verdict.

The jury withdrew, late in the evening, to consider their verdict. They continued together through the night, and were heard at intervals in loud debate. Early the next morning they returned into court, and delivered their unanimous verdict of Not Guilty. The result was no sooner announced, than the welcome news spread like lightning to the assembled crowd within the great hall, thence to the multitude without, who bore it in triumph through the rejoicing capital.

All writers attest the transport of joy, with which the verdict was received. " There was a wonderful shout, (says the Earl of Clarendon, who was present,) that one would have thought the hall had cracked." " The loud

shouts and joyful acclamations of the vast numbers assembled, were (as Sir John Reresby quaintly writes) a rebellion in noise, though not in intention." [NOTE A.]

The nation seemed to feel its own deliverance in the person of the Bishops; and, animated with a mixed feeling of affection for liberty, and of zeal for religion, hailed them as champions of freedom, guardians of the faith, and saviours of the church. There was among the people one universal feeling of sorrow and indignation at their imprisonment, painful anxiety for the event of the trial, and unbounded exultation at their triumphant acquittal.

Shortly afterwards, several interviews occurred between the King and the Bishops. They are intimately connected with the subject of the trial, and give a lively representation of the temper and conduct of these illustrious prelates.*

Interviews
between
the King
and Bi-
shops.

About the end of September, the King, to show his subjects that he was on good terms

* This account is extracted from the Earl of Clarendon's State Letters, vol. ii. App.; and Dr. D'Oyly's Life of Archbishop Sancroft, vol. i.

with the Church, and with a view to conciliate the Bishops, summoned them to attend at his council; and on that occasion declared his good will and affection to them and to the establishment. But all that passed was in the most general and unmeaning terms; nor was any assurance given of an alteration of system, or any pledge of future security. The Bishops were disappointed, but requested to be once more admitted. This was granted; and they had permission to open their minds freely on state of the Church and of the Kingdom at large. The Archbishop came at their head; and they not only spoke boldly their sentiments, but also respectfully submitted their advice to the King, in ten written articles.

The main points suggested were, that the government of the several counties should be entrusted to such of the nobility and gentry as were legally qualified; that the commission for ecclesiastical affairs should be annulled; that no dispensation should be granted, to allow of illegal appointments to offices in church or state; that the dispensing power, so lately exercised, should be desisted from, and that this subject should be calmly and freely debated, and settled, in Parliament; that the vacant bishoprics should be filled up

without delay by the promotion of men of learning and piety ; that all prosecutions of *quo warranto* against corporations should be superseded, and that the corporate bodies should be restored to their ancient privileges and franchises; that writs should be issued with convenient speed for the calling of a free Parliament, in which the Church of England might be secured according to the act of uniformity, and provision made for liberty of conscience and of person ; and thus that a mutual confidence and good understanding might be re-established between the King and the people. " These," said the Archbishop, with the most impressive dignity and calmness, presenting at the same time the written articles, " these are the particulars of advice, which, from a sense of duty to your Majesty and to our country, we deem it fit at this time to offer, and so leave them to your princely consideration. And now, we heartily beseech Almighty God, in whose hand the hearts of all Kings are, so to dispose and govern yours, that in all your thoughts, words, and works, you may ever seek his honour and glory, and study to preserve the people committed to your charge, in wealth, peace, and godliness, to your own temporal and eternal happiness."

At the next interview, about the middle of October, the King informed the Archbishop of the intelligence, which he had received of the design of the Prince of Orange, to make an attempt on England; and pressed upon him the propriety of his drawing up a paper, to declare his abhorrence of the proceeding. To this the Primate answered, he conceived there could not be any necessity for such a declaration, being persuaded that the Prince had not any such design.

The King, not long afterwards, pressed the same thing on the Bishop of London and several other Prelates, requesting them, to make some public avowal of their not having encouraged or invited the Prince to come over to England. They explicitly denied, that they had in any manner invited him to make the attempt. "You may do well," said the King, "and it will be much for my service, if in a written paper you express your dislike of the Prince's design." This he repeated twice: but no one of them made any answer. The King desired them to consider among themselves the plan of drawing up a written declaration, of the nature before suggested, and to communicate the result to him at the next interview.

That interview, which was the last, was fixed for the sixth of November. The Bishops attended on the day appointed; a few hours only after that decisive event, then unknown to them, the landing of the Prince of Orange.

The King, immediately on their admission, asked for the paper which he had desired them to draw up. They answered, that they had not brought any paper, nor did they think any paper necessary or proper. The King replied, he had expected a paper from them; he understood them to have promised one; he looked upon it to be absolutely necessary for his service: and, since the Bishops were mentioned in the declaration of the Prince, as having invited him into the kingdom, they ought to satisfy the world that they had not so acted. The Bishops submitted, that they could not think themselves bound to protest publicly against a paper which had come forth in so private a manner, without a name, and which was said to look more like a lawyer's brief, than a princely declaration; so that scarce one in five hundred believed it to be authentic. — "No!" said the King, with some vehemence; "then that five hundred would cut my throat." — "God forbid," said the

Bishops.—“What! must not I be believed? Must my credit be called in question?”—The Archbishop answered, they had good reason to suspect the declaration not to be the Prince’s, from its containing a clause asserting that he had been invited by many spiritual and temporal Lords: that this must be either true or false: if true, it were unwisely done, to discover it so soon: if false, one could not imagine that a great Prince would publish a manifest untruth, and make it the ground of his enterprise.—“What! he that can do as he does, think you, he will stick at a lie? You all know, how usual it is for men, in such cases, to affirm any kind of falsehoods for the advantage of their cause.” The Bishops remarked, the declaring of peace or war was a business of state, which properly belongs not to them, but to the King alone: to the King only, God had intrusted the sword.

The Archbishop here addressed the King to the following effect: “Some of the Bishops, now present, and others who are absent, have so severely smarted for touching matters of government, that it may well make them cautious, how they do so again. Although they presented a petition of the most inno-

gent nature, and in the most humble manner, yet were they so violently prosecuted, that the prosecution would have ended in their ruin, if the goodness of God had not preserved them. The whole accusation turned upon this one point; the Attorney and Solicitor General both affirmed, that the most honest paper, relating to matters of civil government, might be a seditious libel, when presented by persons who had no concern in such matters; and they asserted, that the Bishops had no concern in the business, excepting in time of Parliament. Indeed, Sir, they pursued us so fiercely upon this occasion, that, for my part, I gave myself up for lost.”—“I thank you for that, my Lord of Canterbury,” said the King, “I could not have thought you would believe yourself lost by falling into my hands.”—The Bishops here came forward. “Sir, my Lord of Canterbury’s meaning is, that he looked upon himself as lost in the course of law; lost in *Westminster Hall*.” But the Primate was not to be diverted from his course. He declared, that the injustice of the prosecution did not cease there. “After we had been acquitted by the jury, and our acquittal recorded, even after that, we were afresh arraigned and con-

demned by several of the Judges, as seditious libellers, in their circuits through England. For so great a scandal, if the law were open, (that is, if the same persons were not judges and parties,) the meanest subject of the realm, so used, would have found abundant reparation in courts of justice." He then mentioned what one of the Judges, Mr. Baron H——, had said in coming from the bench, where he had pronounced the petition of the Bishops to be a factious libel. To a gentleman who asked, how he could have the conscience to say so, when the Bishops had been legally discharged of it, the Judge answered, 'You need not trouble yourself with what I said on the bench : I have instructions for what I said ; and I had lost my place, if I had not said it.' — "Sir, I hope this is not true, though it is true that he said it. There was another of your Judges, Mr. Baron R——, who attacked us in a different manner, and endeavoured to expose us as ridiculous ; alleging that we did not write true English, and it was fit that we should be convicted by Dr. Busby for false grammar." — The Bishops added, that the same Judge, as they had been informed, presumed to revile the whole Clergy of England in the most scandalous language, affirming,

that this Church, which the King had so often promised to cherish and protect, is a cruel and a bloody Church.

The King now addressed the Archbishop :
“ My Lord, this is querelle d’Allemand : all this is a matter quite out of the way. I thought this had been all forgotten. For my part, I am no lawyer : I am obliged to think, what my Judges do, is according to law. But if you will still complain on that account, I think I have reason to complain too. I am sure your counsel did not use me civilly. I know what is commonly said, that it is customary for the counsel to speak what they can for their clients. But they went further, and interposed in matters with which they had nothing to do. As for what you say, that it is hazardous to meddle in matters of state, that is true, when I do not call you to it. But I may ask counsel or assistance of any, as I now do of you ; and then there can be no danger.”

The King with great earnestness urged the Bishops to present to him a paper, signed by them, of the nature before described ; and insisted much on a promise to that effect, which, he said, had been made by the Archbishop of Canterbury and the Bishop of London. But, on this appeal to them, they

respectfully persisted, that they had never promised such a paper, and had only engaged that they would deliberate upon the subject with some of their brethren; and that, if they could agree upon one, they would present it to his Majesty.

The Bishops humbly entreated, that the small number, then present, might not be separated from the rest, as if they were more suspected than others. They further said, that the Lords temporal were equally concerned in the accusation with themselves; and prayed that they might be called together, and joined with them in consulting about this protestation, which was now required of them alone. "Aye," said the King, hastily, "aye, I believe some of the temporal Lords have been already with you, and caused you to change your minds." They all solemnly declared the contrary; and having understood that several of the Peers had been admitted to interviews with his Majesty upon this occasion, they requested to know, whether he had demanded any such thing of them, as he was now pleased to require of the Bishops. The King said, he had not; but that it would be more useful to his service, that they should sign the paper, as

having greater interest with the people. They replied, that in matters of this nature, belonging to civil government and to the affairs of war and peace, it was most probable that the nobility would have far greater influence on the nation than themselves; as they had a higher interest at stake, and the management of such matters belonged more properly to them, "But this," answered he, "is the method I have proposed. I am your King. I am to judge what is best for me. I will go my own way. I desire your assistance in it."

The Bishops submitted, that they had already made their personal vindication in the presence of his Majesty, who had condescended to express himself satisfied; and that it would be in his power to publish what they had said, to all the world, in the royal declaration. "No: — if I should publish it, the people would not believe me." — "The word of a King is sacred," said the Bishops; "it ought to be believed on its own authority. It would be presumption to pretend to strengthen it; and the people cannot but believe your Majesty in this matter." — "They that could believe me guilty of a false son, — what will they not believe of me?"

The King still pressed for a written pro-

testation, declaring it would be a great prejudice to his affairs, if they denied him. The Bishops as earnestly entreated, that in this business they might not be separated from the temporal Peers; but that at least he would appoint a select number of them to meet at a conference. He refused to hear of this; and urged their immediate compliance. They assured him, that the place in which they could most effectually serve his Majesty, was Parliament: and, when he should please to call a Parliament to compose all the distractions of his kingdoms, he should there find, that, as they had always shown their personal affection to his Majesty, so the true interest of the Church of England must be inseparable from the true interest of the Crown. — “That,” said the King, “is a business of more time. What I ask now, is of present concern to my affairs. But this is the last time — I will urge you no further. If you will not assist me as I desire, I must stand upon my own legs, and trust to myself.” —

At last they stated, that, as Bishops, they did assist his Majesty with their prayers; as Peers, they entreated that they might serve him in conjunction with the rest of the Peers, either by his Majesty’s speedily calling a Par-

liament, or, if that should be thought too distant, by assembling together with them as many of the temporal Peers as were in London or in its vicinity. [NOTE B.]

Here the conference closed. The King refused to accede to the suggestion of the Bishops, and dismissed them from his presence, for ever. This memorable interview occurred on the sixth day of November, 1688.

At the conclusion of this long and interesting cause, it may be convenient to give a recapitulation of the principal subjects discussed in the course of the trial; suggesting a few remarks upon each of them in order. Remarks.

1st. The first argument arose, on the motion of the Attorney-General to file the return of the Lieutenant of the Tower to the writ of habeas corpus. The counsel for the defendants insisted, that it did not appear from the return, that the Bishops had been committed by warrant of the Privy Council.

Neither the arguments of the counsel for the Crown, nor the reasoning of the Judges, are at all satisfactory. But that the decision of the Court upon this point was right, cannot be doubted. The counsel for the

Bishops artfully rested their objection upon the *return* and kept out of view, as much as possible, the *warrant*; insisting, that the commitment was illegal, because it appeared from the return, merely that they were committed by Lords of the Privy Council, and not by those *in Council*, or by *order of the Privy Council*. The plain answer is, that the legality of the commitment could not depend upon the *return*, but solely upon the *warrant*; and in this case, actually, the warrant purported to be issued by the command of the King, and to be executed at the Council Chamber at Whitehall; whence it follows, by necessary conclusion, that the warrant was a warrant of the Privy Council.

2d. The second question was, whether the Bishops, as Peers of Parliament, could be legally committed on a charge of libel. The argument for the defence was to this effect: That the Bishops, being Peers of Parliament, and having privilege of Parliament, had not been legally committed for the offence charged in the warrant; and being illegally committed, they could not be compelled to appear or to plead to the information. The ground, on which they argued the illegality of the commitment, was this; that the offence, for which

they had been committed, was not a breach of the peace, for which surety of the peace could be legally demanded.

The counsel for the prosecution in their argument, and the Judges in delivering their opinions, appear to have acceded to the doctrine laid down by the counsel on the other side, namely, that, if the Bishops had been committed by the Privy Council illegally, they could not now be compelled to appear and plead to the information; but would be entitled to their discharge *instanter*, although they were brought before the Court, not on a writ of *habeas corpus* sued out on their behalf for the purpose of their discharge, but on a *habeas corpus* issued on behalf of the Crown, for the purpose of charging them with a misdemeanor. They appear to have admitted also, that the Bishops were not legally committed as Peers of Parliament, if the charge against them, of publishing a seditious libel, was one for which, in the case of a common person, surety of the peace could not be regularly demanded. But the counsel for the Crown insisted, that for this offence surety of the peace might be required; and upon this point turned the whole of the argument. Three of the Judges held, that surety of the peace

might be legally required on such a charge : consequently, upon the principles assumed by the counsel for the Bishops, the plea of privilege of Parliament altogether failed.

The main question which arose for the Court to determine, was, not whether the Bishops could be committed on a charge of publishing a seditious libel, nor whether surety of the peace might be required on such a charge, but merely whether the information ought to be read, and whether the Bishops ought to plead to it ? It was for the purpose of deciding this question only, that the Judges seem to have thought it necessary to determine incidentally another and much more extensive question, — whether a commitment of Peers of Parliament, on such a charge and such a warrant, was legal. Although the three Judges, who delivered their opinions, were evidently unwilling to touch the question of privilege, yet it is clear that they did decide that question ; and they decided it on the ground, that surety of the peace might be demanded for publishing a seditious libel. It is remarkable, that although the objection necessarily involved the question of privilege of Parliament, yet scarce any thing was said on the nature and extent of such privilege, and

not any information upon this subject was supplied by the arguments on either side.

This decision has been declared by the Lord Chief Justice Pratt, in the case of the King against Wilkes, not to be law.* In that case the Court of Common Pleas determined, that Wilkes, having privilege of Parliament, could not be legally committed to prison on a charge of being the publisher of a seditious libel; and, therefore, on a writ of *habeas corpus*, sued out on the behalf of the party committed, the Court discharged him without bail. The Lord Chief Justice Pratt, in delivering his judgment, referred to the passage in the 4th Inst. p. 25, where Sir Edw. Coke says, "The privilege of Parliament holds, unless it be in three cases, namely, treason, felony, and *the peace*;" and the words, *the peace*, he construed to mean *actual breach of the peace*. He referred also to the case of the seven Bishops, (for it was necessary to overrule the opinions of the three Judges in that case, before the Court of Common Pleas could discharge Wilkes, who had been committed on a similar charge,) and is reported to have

* 2. Wilson, Rep. 151. 159

said, that, even if a libel be supposed to be a breach of the peace, yet it cannot exclude privilege; and that he could not find in any book whatever, that a libeller is bound to find surety of the peace, nor had he heard of it in any case, except that of the seven Bishops; and he declared, that the Bishops had been ousted of their privilege most unjustly. Thus, in the case of the King against Wilkes, the Court of Common Pleas, overruling the opinions of the three Judges in the case of the seven Bishops, determined, first, that surety of the peace could not be required on a charge of publishing a seditious libel; and, secondly, that a person, having privilege of Parliament, could not be committed to prison on such a charge.

As to the first of these points, (that surety of the peace is not demandable on a charge of libel,) the statement of the Lord Chief Justice Pratt—that he had never read or heard of a case, in which the surety of the peace had been required—is of itself a strong authority against the legality of requiring such surety. On a careful search, not any recorded instance has been found of surety of the peace, strictly so called, having been taken on a charge of libel, before indictment or information:

surety of the peace, strictly so called, being generally taken on *articles of the peace*. But for a very long period it seems to have been the practice, on a charge of libel, before indictment or information, to take surety *for good behaviour*, which bears a close affinity to the other kind of surety, and answers the same purpose. It appears, on inquiry at the Crown Office, from information kindly supplied by Mr. Dealtry, that, until about the year 1770, it was the constant practice of Secretaries of State, and of justices of the peace, to issue warrants for holding parties to bail in cases of seditious libel, before information filed or indictment found. This practice is recognized in many cases: in the case of Dover, committed by Sir James Eyre, one of the Judges of the Court of King's Bench, in 1694, for want of bail to answer a charge, upon oath, of printing treasonable books and libels; in the case of Bell, 12 Mod. Rep. 348.; in the case of Derby, Fortesc. 140.; in the case of Franklin, 2 Barnardiston, 85.; in the case of Dr. Earbury, 2 Barnardiston, 293. 346.; and in the case of Shuckburgh, 1 Wilson, 29. It appears also, from inquiry at the Crown Office, that together with such recognizance *for appearance*, recognizances were very commonly

taken, binding the party to be in the mean time of good behaviour. But the Judges having doubted, whether the party could be required to give security *for good behaviour*,* the practice of taking such recognizances grew into disuse; and it became unusual also to hold parties to bail for their appearance in the Court of King's Bench, until after an indictment was found against them. Still, however, in some few instances, justices of the peace, before whom a party was brought by virtue of a warrant, issued on an actual breach of the peace or for the publication of a seditious libel, would, *upon its being signified that the prosecution was intended to be carried on in the Court of King's Bench*, bind the party to appear *there*, instead of taking a recognizance for his appearance at the *sessions*: as was done in the case of Spence, in 1801, and in Hogg's case, in 1802.

The old practice of taking security for *good behaviour*, before indictment found or information filed, has been sanctioned by a provision in a late statute, 60 G. 3. c. 9. s. 16., which authorizes any court of record at Westminster or Dublin, or of great session

* See *Rex v. Earbury*, 2 Barnardiston, 293. 346.

in Wales, or any Judge thereof respectively, or any court of quarter or general sessions of the peace, or any justice of the peace, before whom any person charged with having printed or published any blasphemous, seditious, or malicious libel, shall be brought for the purpose of giving bail upon such charge, to make it a part of the condition of the recognizance, to be entered into by such person and his bail, that the person so charged shall be of good behaviour during the continuance of such recognizance.

With regard to the second point, decided in Wilkes's case, as to the claim of privilege of Parliament on a charge of libel, if the rule, laid down by Sir Edward Coke in the passage cited by the counsel for the Bishops, is taken as the correct rule of law on the subject of privilege of Parliament, (namely, that "privilege of Parliament in informations for the King, [and] generally the privilege of Parliament, do hold, unless it be in three cases, treason, felony, and *the peace*,") the question in the case of the seven Bishops, and also in Wilkes's case, would turn upon the true meaning of the words, *the peace*, in that passage. If the meaning is, that privilege does not hold, except in the three cases of treason,

felony, and *actual breach of the peace*, the point is clear in favour of the privilege; since the publication of a libel is not an *actual* breach of the peace, and therefore not within the exception.

If the true meaning of the passage is, that privilege holds, except in the three cases of treason, felony, and *breach of the peace*, or, generally, an *offence against the peace*, (which words would include a *constructive* as well as an *actual* breach,) the decision, in that case, must be against the privilege; for libels are adjudged to be an offence *against the peace*, as having a direct tendency to a breach of the peace.

But if the passage is understood to mean, that the privilege of Parliament exists, except in treason, or felony, or where the party, claiming it, *refuses to find surety of the peace*, then, since the Bishops did not appear to have refused such surety, they would be entitled to their privilege. In either of these cases, the question of privilege might be decided without any difficulty.

In the case of the seven Bishops, the counsel for the defence argued, that another meaning was to be put upon the words, and they read the passage thus: that "privilege holds, ex-

cept in the three cases of treason, felony, or where the offence is such, that surety of the peace may be legally required." And the question, first proposed by them, then taken up by the counsel for the Crown, and ultimately decided by the Court, was, whether surety of the peace could be required on the charge of publishing a seditious libel? This appears to be not a very obvious or natural construction of the passage referred to; nor is it easy to understand, why the mere *liability* to give surety of the peace, without regard to the fact of surety being *demand*ed and *refused*, should have the effect of excluding privilege. It seems not unreasonable, that a person should lose his privilege from arrest, for *refusing* such surety; but why he should lose it, because surety is *demandable*, seems not very intelligible. Upon the whole, it is not distinctly stated, upon what principle the privilege of Parliament was denied in the case of the seven Bishops, and admitted in the case of Wilkes.

Shortly after the decision of the Court of Common Pleas, in the case last mentioned, the libel, for which Wilkes had been committed, became the subject of discussion in Parliament. On that occasion, both the House of Commons and the House of Peers

resolved, that "privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws, in the speedy and effectual prosecution of so heinous and dangerous an offence." A protest against this resolution, written with great ability, was signed by seventeen Peers; Lord Ashburnham being one of the dissentient Peers.*

One part of this protest, which defines the extent of privilege of Parliament, contains much valuable information. "The law of privilege, (say the dissentient Lords,) touching imprisonment of the persons of Lords of Parliament, as stated by the two standing orders, declares generally, that no Lord of Parliament, sitting the Parliament, or within the usual times of privilege of Parliament, is to be imprisoned or restrained, without sentence or order of the House, unless it be for treason, or felony, or for refusing to give security for the peace, and refusal to pay obedience to a writ of *habeas corpus*.

* See Journals of House of Lords, p. 426., 29th Nov. 1763. See also 19 Howell, 994., where the protest is stated at length.

The first of these was made after long consideration, upon a dispute with the King, when the precedents of both Houses had been fully inspected, commented upon, reported, and entered in the Journals, and after the King's counsel had been heard. It was made in sober times, and by a House of Peers not only loyal, but devoted to the Crown ; and it was made by the unanimous consent of all, not one dissenting. These circumstances of solemnity, deliberation, and unanimity, are so singular and extraordinary, that the like are scarce to be found in any instance among the records of Parliament.

“ When the two cases of surety for the peace, and *habeas corpus*, come to be well considered, it will be found that they both breathe the same spirit, and grow out of the same principle. The offences, that call for surety and *habeas corpus*, are both cases of present continuing violence ; the proceedings in both have the same end, namely, to repress the force, and to disarm the offender. The proceeding stops in both, when that end is attained ; the offence is not prosecuted or punished in either ; the necessity is equal in both ; and, if privilege was allowed in either, so long as the necessity

lasts, a Lord of Parliament would enjoy a mightier prerogative than the Crown itself is intitled to. Lastly, they both leave the prosecution of all misdemeanors still under privilege, and do not derogate from that great fundamental, that none shall be arrested in the course of prosecution for any crime under treason and felony. These two orders comprise the whole law of privilege, and are both of them standing orders, and consequently the fixed laws of the House, by which we are all bound, until they are duly repealed."

Although the House of Peers and House of Commons have declared in their resolution, that the privilege of Parliament does not extend to the case of writing and publishing *sedition* libels; yet that resolution does not exclude privilege in the case of a malicious libel against an individual. And the case of the King against Wilkes is still an authority to show, that in the case of a charge for writing or publishing any other than a *sedition* libel, a person, having privilege of Parliament, is not liable to arrest.

The arguments in the case of Wilkes, as also in that of the seven Bishops, seem to have assumed, that a common person, not having privilege of Parliament, might be

legally apprehended on the charge of writing and publishing a seditious libel. And it is now settled, that such person may be apprehended by a justice of the peace, and committed for want of bail, for writing or publishing a seditious libel against the Government, or a libel against a Minister of State, or against a Judge.* The same principle seems also to apply to the case of writing or publishing a malicious libel against any person.

3d. The third argument was upon a point of practice, whether the Bishops were compellable to plead *instante* to the information, or whether they might have an imparlance? The Court determined, that there was no right of imparlance. The rule of practice for about twelve years before this trial, according to the information of Sir Samuel Astry and other officers of the Crown Office, appears to have been, as laid down by the Court, that any person, brought in custody, should not have an imparlance, but plead *instante*; and this, although he appeared on the first process, and was not in contempt. The older practice

* The case of Butt, who was committed for publishing a libel against Lord Castlereagh, and another against Lord Ellenborough, 1 Brod. and Bing. 548.

was in favour of an imparlance; and it was no very strong argument in support of the new practice, that during the short period of twelve years, in which it was said to have grown up, there had been not less than twelve Chief Justices appointed.

After the Revolution, the practice was again altered, and the ancient practice restored. In the first year of Will. & Mary, the Court of King's Bench determined, in Cox's case, that a person, appearing on recognizance, was not compellable to plead, but might imparle till the next term.* And a few years afterwards Lord Chief Justice Holt laid down this rule, — that if the party come in upon the first process, he has an imparlance of course; but if upon an attachment, he must plead *instante*.† On making inquiries at the Crown Office, the following cases have been furnished by the kindness of Mr. Dealtry. In 1587 Lord G. Gordon, being charged with the offence of libel, appeared in Court on *venire*; and it was held, that he had a right to imparle till the next term, as he had come in on first process. In 1817 Hone was brought into Court on a Judge's warrant, on an information for

* 1 Shower, [56.]

† 1 Salk. Rep. 367.

a libel ; and was allowed to imparle. It has been lately enacted, by the act of 60 Geo. 3. c. 4. sect. 1., that the party, appearing in Court in person, to answer to an indictment or information for a misdemeanor, shall not be permitted to imparle to a following term, but shall be required to plead or demur within four days from the time of appearance. And in case the party appear by clerk in Court, he shall not imparle to a following term, but a rule, requiring the defendant to plead, may be forthwith given, and a plea or demurrer enforced, or judgment by default entered, in the same manner as might have been done before the act passed.

4th. There was much discussion, in this case, on the subject of legal proof of handwriting. This subject appears to have raised more argument at the Bar, and much more doubt upon the Bench, than the case would, at this time, be thought to warrant. It is now settled, that if a witness has received letters, which can be proved to have been written by a particular person, or letters of such a nature as to remove all doubt of their having been written by the hand from which they profess to come, he may be admitted to give evidence as to the character

of that person's handwriting. And the legal reader will not, it is conceived, feel much difficulty in acquiescing in the opinion of the two Judges, who held, that, although some of the signatures had not been proved, (and, therefore, some of the Bishops were to be considered as not at all implicated in the transaction,) yet that the petition might have been properly read against those of the Bishops, whose signatures had been sufficiently proved by competent evidence.

5th. The only other objection, raised by the counsel for the Bishops, was that relating to the proof of the publication of the paper in Middlesex. This point occurred, before the arrival of Lord Sunderland; at which time a majority of the Court were of opinion, that the publication had not been sufficiently proved. The charge against the Bishops, it will be remembered, was, that they composed, wrote, published, and caused to be composed, written, and published, a certain libel in the county of Middlesex. As to the charge of composing and writing, there was not the slightest evidence of this being done in Middlesex; for it is absurd to maintain, that an acknowledgment of the mere fact of writing is any proof of the place where it was written.

With regard to the other part of the charge, namely, the *publishing and causing to be published* in the county of Middlesex, the case for the Crown was much stronger than might be supposed from the course of the arguments. If the result of the evidence is to be taken as amounting only to this, that the Bishops confessed in Middlesex their handwriting on a paper, which was stated to have been written in Surrey, that unquestionably would not be evidence of a *publication* by them in Middlesex; though that point was argued by the counsel for the Crown, and properly overruled by the Court.* But on a more attentive examination it will appear, that there were other important circumstances in the case, (independently of the evidence of Lord Sunderland,) which might reasonably have led the jury to conclude, that the petition was delivered by the Bishops to the King, in the Council Chamber at Whitehall, or, in other words, published in the county of Middlesex. For it was proved, that this petition had been in the hands of the Bishops, who had signed it; that on a certain day the petition was seen

* See the opinions of Lord Ellenborough and Mr. Justice Lawrence. 7 East. Rep. 68, 69.

in the hands of the King, in the Council Chamber at Whitehall; that the Archbishop and Bishops were in the presence of the King at that time; and that on being questioned by the King, on the subject of the petition, they admitted their signatures. It appears, further, from the paper itself, that it was addressed to the King, written for the purpose of being delivered to the King, and intended to be presented in the usual course, as a petition. Upon these facts, a person, of plain understanding, might reasonably come to the conclusion, that the Bishops delivered the petition to the King, on that day, and at that time, when they were seen in the royal presence. If this be so, there was evidence, as to the fact of publication in the county of Middlesex, fit to be submitted to the jury for their consideration.

The question is not one of abstract law, but of common sense. If the inference, here suggested, is not strained, but such as a mind, reasoning upon facts, would correctly form, it cannot be doubted that there was evidence, to support the charge of publication. And as there was no proof, on the other side, to repel this inference, or to raise a contrary presumption, the jury would have been warranted in concluding, from the facts above

stated, that the petition was presented by the Bishops, and that Whitehall was the place of presentation. This appears to be the true result of the evidence, even without the aid of Lord Sunderland's testimony ; and it is not a little extraordinary, that the Chief Justice and two other Judges, with such evidence before them, should be of opinion, that there had not been any proof of a publication in the county of Middlesex. The statement of Lord Sunderland gave a new turn to the cause, and removed all doubt upon the point of publication.

The nature of presumptive evidence and of presumptions, (which have been, in general, much too technically treated,) is best explained and illustrated by the judgments of the Court of King's Bench in the late case of Sir Francis Burdett.* The following passage is selected from the judgment of the Lord Chief Justice Abbott :—" A presumption of any fact is, properly, an inferring of that fact from other facts that are known : it is an act of reasoning ; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred, without premises

* 3 Barn. & Ald. Rep. 717. † Barn. & Ald. 95.

that will warrant the inference ; but if no fact could be ascertained by inference, in a court of law, very few offenders could be brought to justice. In a great portion of trials, as they occur in practice, no direct proof, that the party accused actually committed the crime, is or can be given. The man who is charged with theft, is rarely seen to break the house or take the goods ; and in cases of murder, it rarely happens, that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup. In drawing an inference or a conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, (if the conclusion, to which the proof tends, be untrue,) and the accused offers no explanation or contradiction ; can human reason do otherwise than adopt the conclusion, to which the proof tends ?

The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily ; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected ; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit ; and not by the judgment of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement."

NOTES.

NOTE A. p. 321.

FOR the citation from Sir John Reresby's Memoirs, I refer to Dr. D'Oyly's Life of Archbishop Sancroft, vol. i. p. 308. The reader will find in the same volume, a letter from the solicitor for the defence, addressed to the Archbishop, written just before the delivery of the verdict, which contains the following remarkable passage: "In case a verdict pass for us, (which God grant in his own best time,) the present consideration will be, how the Jury shall be treated. The course is usually, each man so many guineas, and a common dinner for them all. There were twenty-two of the jury who appeared, and no more; and they that did not serve will expect a reward as well as those who did." It was the well-known and allowed practice of those days, that the successful party should fee the jury for their verdict.

NOTE B. p. 333.

The Archbishop, and four of the six Bishops, refused to take the oath of allegiance to William III. They were suspended from their functions, and after-

wards deprived. Lake, Bishop of Chichester, shortly before his death, signed a solemn declaration, professing his assent to the doctrine of non-resistance and passive obedience, which he considered to be the distinguishing character of the Church of England. After his death this paper was published, and extolled by the party whose views it favoured, as an inspired oracle, pronounced by a martyr to religious truth. Smollett, Hist. vol. i. p. 11. 69. Ralph, Hist. vol. ii. p. 66. 167.



APPENDIX.

For the following Disquisition, on the Court of the Lord High Steward, I am indebted to the kindness of my valued friend Mr. AMOS. On this subject, which has not yet been treated at large or systematically by any writer, he has, with great ability and research, collected and arranged a variety of useful information, of which a considerable part has never before been presented to the public. The subject is closely connected with a work on the State Trials; as it was before this Court, that Peers were formerly tried for high treason.

A DISQUISITION ON THE COURT OF THE LORD HIGH STEWARD.

It is proposed in the following disquisition to investigate, in the first place, the origin of the High Steward's authority on the trial of Peers, and to notice the principal occasions on which it has been exercised in the earlier periods of our history. Afterwards, it is intended to point out the distinctions, which exist in the duties and the capacity of the High Steward, when he officiates in a court composed of a select number of Peers summoned by virtue of his precept,

and when he presides at the trial of a Peer in the House of Lords, either upon an impeachment, or, on an indictment found by a Grand Jury. Some authorities will then be referred to, respecting the rank of the individual qualified to hold the office of High Steward. An enquiry will follow, concerning the right or liability of certain classes of persons to be tried before the High Steward and a limited number of Peers, properly called the High Steward's Court. In the next place, some legislative enactments, and some determinations of the House of Lords, relating to the jurisdiction and constitution of the High Steward's Court, will be detailed; and, lastly, a few observations will be offered, respecting the interpretation and the policy of the Treason-Bill in the reign of William III., so far as it regards this subject.

The judicial authority of the Lord High Steward appears to have grown out of that which appertained to the Chief Justiciar at the period when the latter office was abolished: and thus, in effect, whenever he presides for the trial of Peers, the power and jurisdiction of the ancient *Curia Regis* is revived. (a) A manuscript of great antiquity, belonging to the

(a) Lord Lyttelton's History of Henry II. lib. ii. Madox's Exchequer, p. 33. Spelman's *Gloss. ad vocem*. Hunt's argument for the Bishops, ch. 15. And further, concerning the ancient office of Seneschall, see several papers in Hearne's curious discourses, and a variety of tracts upon the subject among the Harl. and Cotton. MSS. For the origin of the judicial power exercised in Parliament on the trials of Peers, see Sir Matt. Hale on the Jurisdiction of the Lords, ch. ix. North's Life of Lord Keeper Guilford, vol. ii. p. 8.

Cottonian Collection in the British Museum; shews that the Lord High Steward exercised, in very early times, a summary authority over favourites who gave the King evil counsel. It belonged to his office to admonish them to depart from the court, and to advise the King to discharge them; and in case his persuasions proved ineffectual, he was empowered to seize them "*nomine Regis, tanquam inimicos publicos Regis et Regni,*" and to keep them in safe custody until the next Parliament. It is further related, in the same manuscript, that the proceedings against Godwin Earl of Kent, Hubert de Burgh, and Piers Gaveston, were pursued at the instigation of this officer. (a) Sir E. Coke observes, that neither the Mirror, Bracton, Britton, or Fleta, make mention of the Lord High Steward, and he says, that it seems as if our ancient authors were apprehensive of treating concerning his authority.

The little information that can be collected in the present day, respecting the ancient trials of Peers, has frequently been the subject of remark by writers upon the constitution. In the earlier reigns, and particularly in the times of Edward III. and Richard II., those tumultuary appeals in Parliament appear to have prevailed, which were prohibited by a statute of Henry IV., and which were finally decided by the Judges to be

(a) Cotton. MSS. *Vespasian*, B. vii. fol. 99. B. This appears to be the MSS. referred to in 4 Inst. p. 58., and which Mr. Petyt says is dangerous to be printed. See Petyt MSS. vol. xix. p. 293. It is also transcribed in a modern hand by D'Ewes, who supposes it to be of the age of Edward II. See Bib. Harl. 305. Plut. 32 F. In the Annual Register A. D. 1783, p. 102., its antiquity is stated to be of the reign of Henry VI.

contrary to law, upon the occasion of the Articles which were preferred by the Earl of Bristol against the Earl of Clarendon. At a later period, Bills of Attainder were commonly resorted to, in derogation of the right of trial confirmed by Magna Charta.

The absence of all precedents, as to the trials of Peers before the High Steward, previous to the reign of Henry IV., may in some measure be accounted for by the circumstance, that, before this period, the office was hereditary, and the proceedings of the Court were probably kept in a repository of its own; whereas the preservation of the records, subsequent to that time, has been owing to their having been transmitted into the Court of King's Bench: This practice commenced, when the High Steward was appointed *pro unicâ vice*, which has been the case ever since the accession of the Duke of Lancaster, the last hereditary High Steward, to the throne. (a)

The Year Book of the reign of Henry IV., contains a very circumstantial relation of a trial before the Lord High Steward: it is that of the Earl of Huntingdon. The authority, however, of this precedent has been thought to be impugned by the conflicting evidence of contemporary history, and of the Parliamentary Rolls. (b) Two commissions of the

(a) At the Conference between the Houses of Parliament upon the subject of the Treason Bill of William III., the Commons supported the antiquity of the court of the Lord High Steward before the reign of Henry IV. by this argument.

(b) Sir E. Coke says, that he does not find mention of the High Steward in any act of Parliament, or any book-case

reign of Edward IV., for constituting a High Steward, have been collected by the industry of Prynne; but the object of those commissions was not to appoint an officer to preside at the trial of a Peer. They are both curious documents; and the recital of the latter of them, is particularly interesting, from the circumstance, that the appointment was for the purpose of putting in execution an Act of Attainder passed against the King's own brother, the Duke of Clarence. (a) The Year Book of the reign of Edward IV., contains a memorandum, that when a Peer is indicted for treason or felony, and the indictment is transmitted to the Lords, the High Steward shall put him to answer, and, if he pleads not guilty, that he shall be tried *per pares*; then the Lords Spiritual must withdraw, and make their proxies; and the High Steward shall ask the youngest Lord, if the prisoner is guilty, and so, in order, the others. Two or three more instances of the appointment of a High Steward for the trial of Peers, of the like antiquity with those which have been mentioned, are briefly referred to by Sir E. Coke. (b)

But it is from the transactions of the reign of Henry VIII., that the greater part of our knowledge

before 1st Henry IV., and very few since. See 4 Inst. p. 59. As to the authenticity of the precedent of the Earl of Huntingdon's case, see Conference respecting the Treason Bill of William III. Hatsell's Precedents, vol. iv. App. n. 3., and 4 Inst. p. 59. in margin; also a paper by Mr. Tate in Hearne's curious discourses.

(a) Prynne's Animadversions, p. 47.

(b) 5 Inst. p. 31. in margin; 4 Inst. p. 59., Earl of Devon's case; and 6 Howell's St. Tr. p. 314.

respecting the forms of procedure, observed at the trials of Peers in the Court of the High Steward, is derived. In the Year Book of Henry VIII., the circumstances attending the trial of the Duke of Buckingham, are related with particularity. (a) In the case of Lord Dacre, who was arraigned before the Duke of Norfolk, officiating as High Steward, various points of law received a solemn determination; and those constitute the principal rules, that have regulated the trials of Peers on all subsequent occasions. (b) In the reigns following that of Henry VIII., several trials of Peers have taken place before the High Steward, which are very memorable in the history of this country, and of which authentic records have been preserved. And although Lord Bacon panegyrises King James, for having reigned twenty years in white robes without the blood of any Peer of the kingdom, yet he acknowledges, that the axe had been turned more than once towards a Peer, though it had never struck.

It is very remarkable, that of the trials of Peers, which have occurred before the High Steward, upon indictments found by a grand jury, very few of those antecedent to the Revolution have taken place during a session of Parliament. (c) This circumstance

(a) See also Lord Herbert's *Life of Henry VIII.*, p. 101.

(b) Moore's *Rcp.* p. 622. Kelyng, p. 56. Rushworth's *Hist. Coll.* part 1. vol. ii. p. 94.

(c) Compare *Lords' Journals*, 19th April, 1791, (which contains, "A table of the commencement, adjournment, prorogation, and dissolution of Parliaments from the ninth year of Henry III. to the second year of William and Mary,") with Harl. MSS. 2194, (which contains, "A List

will, perhaps, explain how it happens, that the authors, who before that period professedly treated on the subject, have so briefly and obscurely adverted to any other form of proceeding than the trial by a select number of Peers, summoned by the precept of the High Steward. The deficiency of information, respecting the trial of Peers in the *House of Lords*, cannot fail to suggest itself to the reader, on perusing the celebrated treatises of Staundford and Sir E. Coke: these eminent writers have not pointed out any distinctions between one form of the trial of Peers and another. (a) A variety of legal determinations, in prosecutions before the High Steward, have always been deemed, in parliamentary proceedings, in legal treatises, and in controversial writings, conclusive authorities for regulating the practice in every species of trial; indeed, it is from this source, that the rules of law, observed in the trial of Peers before the House of Lords, are principally derived. (b)

of High Stewards from the time of William the Conqueror to that of Charles I. with the trials of persons tried before them.") In several cases both of Hargrave's and Howell's collection of State Trials, there is an error in the statement of the Court.

(a) Staundford, p. 152., *Triall per les Pieres*, 3 Inst. p. 30., 4 Inst. ch. 4.; Crompton's *Jurisdiction*, p. 82. Pulton de pace, 1976. *Trials per pais*, ch. 2. Hale's *P. C.* vol. i. p. 350. vol. ii. p. 7.

(b) See "*Magnatum apud Anglos privilegia*," where the authorities for every privilege are collected. Somers' *Tracts*, vol. xiii. As to the different reasons assigned, why Peers cannot be challenged, (which point was decided in

respecting the forms of procedure, observed at the trials of Peers in the Court of the High Steward, is derived. In the Year Book of Henry VIII., the circumstances attending the trial of the Duke of Buckingham, are related with particularity. (a) In the case of Lord Dacre, who was arraigned before the Duke of Norfolk, officiating as High Steward, various points of law received a solemn determination; and those constitute the principal rules, that have regulated the trials of Peers on all subsequent occasions. (b) In the reigns following that of Henry VIII., several trials of Peers have taken place before the High Steward, which are very memorable in the history of this country, and of which authentic records have been preserved. And although Lord Bacon panegyrises King James, for having reigned twenty years in white robes without the blood of any Peer of the kingdom, yet he acknowledges, that the axe had been turned more than once towards a Peer, though it had never struck.

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In modern times, several important distinctions, in respect of the trial of a Peer, according as the prosecution takes place in the Court of the High Steward, or before the House of Lords, have become the subject of judicial consideration. As these distinctions have reference to the proceedings, by impeachment, and on indictment removed by *certiorari* to the House of Lords, it will be necessary to premise a few observations on the history and the nature of these forms of prosecution.

For about a century and a half previous to the reign of King James, there appears to have been a remarkable suspense of the criminal jurisdiction of the House of Lords. This arose principally from the preference shewn during the sitting of Parliament to Bills of Attainder, which were sometimes passed without summoning the party, whose life was to be affected by them; (a) — a practise, which Sir E. Coke reprobates, in the following strong expressions, "*Auferat oblivio, si potest; si non, utcunque silentium tegat.*" Although impeachments by the Com-

the cases of Lord Essex and Lord Audley,) see Moore, p. 622; Rushworth's Hist. Coll. part I. vol. ii. p. 94. Hale, P.C. part II. p. 275. 1 Inst. 156. b. Hackett's Life of Lord Keeper Williams, p. 77. And with respect to the concurrence of twelve Peers being necessary to a conviction, see Conference respecting the Treason Bill, Hatsell, vol. iv. App. n. 3. Black. Com. vol. iv. p. 342. "Questions legal for the Judges on the trial of the Earl and Countess of Somerset." Hargr. St. Tr. vol. i.

(a) Hargrave's Preface to Hale's Jurisdiction of the House of Lords, p. 7. Hatsell's Precedents, vol. iv. p. 72.

mons are known to have been in use as early as the reign of Edward III., yet it is truly observed by Lord Clarendon, in his History of the Rebellion, when speaking of the impeachment of Lord Treasurer Middlesex, that, with the exception of the memorable case of Lord Bacon, the like proceeding had not been instituted for very many years. And historians relate the admonitions of King James to the Duke of Buckingham, upon the impolicy of introducing a precedent, fraught with so much danger to the Ministers of the Crown. The celebrated impeachment of Lord Strafford in the succeeding reign, from the number of legal questions which were determined in the course of the proceedings, has always been considered as a most important æra in the history of parliamentary judicature. And towards the latter part of the reign of Charles II., upon the occasion of the impeachment of Lord Danby and the five Popish Lords, the law in respect of this form of prosecution underwent an elaborate and animated discussion in both Houses of Parliament, and became the subject of many controversial writings replete with constitutional learning.

There does not appear to have been any High Steward appointed on the occasion of the proceedings against Lord Bacon or against Lord Middlesex. On the impeachment of Lord Strafford, the Lords, from a motive of hostility to the prisoner, (as Lord Clarendon insinuates,) appointed Lord Arundel to preside as the High Steward, by an order of the House. Among the important questions that were settled, on the impeachments of Lord Danby and of the Popish Lords, it was resolved, that the office of Lord High Steward was not essential to the

proceedings. And the Lords directed, that the commission of that high officer, who was appointed in consequence of an address to the Crown, should be altered, by the omission of such expressions as intimated the necessity of his appointment. This was effected by erasing the words, "*ac pro eo quod officium Seneschalli Angliæ (cujus præsentia in hac parte requiritur), ut accepimus, jam vacat,*" and inserting, in the place of them, the following, "*ac pro eo quod proceres et magnates in Parlamento nostro assembleti nobis humiliter supplicaverunt, ut Seneschallum Angliæ pro hac vice constituere dignaremur.*"(a) In conformity with the same views, all parties appearing before the Court, at Lord Stafford's trial, were ordered to address themselves to the Lords in general, and not particularly to the High Steward. On that occasion, the High Steward officiated merely as Chairman of the House, voting in the same manner as the other Peers, who took upon themselves the decision of all questions as well of law as of fact.

Since the Revolution, the rules, which were established on the occasion of Lord Stafford's trial, have been uniformly adhered to, in proceedings upon impeachments; and in conformity with the determination, that the office of High Steward is unnecessary in prosecutions of this nature, the Lords have, in several instances, performed various judicial acts, previous to his appointment. (b)

(a) Lords' Journals, 13th May, A. D. 1679. Commons' Journal, 15th May, A. D. 1679. Hatsell's Precedents, vol. iv. p. 207. n., 293. n., 297. n., 317. n., 318. n.

(b) See the instances collected by Sir M. Foster, Crown Law, p. 149.

In regard to trials of Peers before the House of Lords upon indictments found by a grand jury, it perhaps may be inferred, that all the Lords were present at the trial related in the Year Book of Henry IV. This circumstance appears to have been overlooked in the arguments at the conference respecting the Treason Bill, in which the case of the Earl of Huntingdon was the only precedent adduced by the Commons, to impugn the position of the Lords, that the form of trial by a select number of Peers was introduced by Henry VIII. So, in the passage which has been cited from the Year Book of Edward IV., the form of trial described is apparently one before the House of Lords. (*a*) And Sir E. Coke observes, that instances of the arraignment of a Peer upon an indictment for treason, felony, or misprision, in the Upper House of Parliament, are frequent in the Parliament Rolls; but he supports his assertion by examples of impeachments, and of other criminal prosecutions differing in their nature from indictments. (*b*)

A short time previous to the deliberations respecting the trials of the Popish Lords, Lord Pem-

(*a*) It has been said, that there never was but one Parliament, in which a Procurator was appointed to represent the Bishops on a trial in a capital case, viz. that of the 21st Richard II. At that Parliament, it was done three times. See Lord Hollis's Letter respecting the right of the Bishops, p. 28.

(*b*) 3 Inst. p. 31. in margin. Two of the precedents which he cites are of this nature; and the remaining one he cites in his 4th Inst., as an instance of a trial by a select number of Peers.

broke, who had been indicted for murder, was tried during a session of Parliament. The Lord High Steward (Lord Nottingham) particularly observed to the prisoner, that he was to be tried not by a select number, but by the whole House of Peers; and by a special order of the Lords at that trial, it was determined that the High Steward should give his vote in his place as Chancellor. (a) It is remarkable, that subsequent to the Revolution, every trial of a Peer or Peeress that has occurred, will be found to have taken place during some session of Parliament. (b)

The duties and capacity of the High Steward appear to have been considered as closely analogous, both where the form of prosecution has been that of an indictment found by a grand jury, and in cases of impeachment. But the commission of the High Steward, in the former instance, has not undergone the alteration, which, in consequence of the resolutions preparatory to Lord Stafford's trial, has been adopted in the proceedings by impeachment. Sir M. Foster, however, does not consider this circumstance as leading to any difference in the functions of the presiding officer: and accordingly, in the case of Lord Ferrers, it was decided by the Judges, that if the day appointed in the judgment for the execution of a Peer, convicted by the House of Lords upon an indictment, should elapse before execution done, a new time of execution might be appointed, although no High Steward be existing. The reasons, upon which

(a) Lords' Journals, 4th April, A. D. 1768.

(b) See the cases of Lords Warwick, Kilmarnock, Balmerino, Cromartie, Ferrers, Byron, and the Duchess of Kingston, in the Lords' Journals.

this decision was founded, have been communicated to the public by Sir M. Foster; and it appears, that they are principally derived from the determinations made in the case of the Popish Lords, and the practice consonant thereto, which has been observed in impeachments since the Revolution. (a)

The foregoing enquiry, respecting the form of prosecution by impeachment, and the trial of Peers upon indictment before the House of Lords, will explain many of the distinctions, which constitute the important features of the modern law relative to the jurisdiction of the High Steward. Within a few years after the proceedings in Lord Stafford's case, and in the reign of James II., Lord Delamere was tried upon an indictment for treason before Lord Chancellor Jefferies, who had been appointed to the office of High Steward for that occasion. The trial took place during the prorogation of Parliament, and it was ruled by Lord Jefferies, that when Parliament was *prorogued*, a Peer had no privilege to

(a) Sir M. Foster's Crown Law, p. 141. For the form of the commission, where a Peer is tried upon indictment before the Lords, see Lords' Journals, 28th July, A. D. 1746, 17th April, A. D. 1760, 16th April, A. D. 1765, 15th April, A. D. 1775. It is customary for the House of Lords, on the trials of Peers upon indictment before them, to direct all parties appearing before the Court to address the Lords in general, and not the High Steward in particular. Lords' Journals, 31st March, A. D. 1760. 1st April, A. D. 1765. 24th Nov. A. D. 1775. It is usual to address the King for the appointment of a High Steward, in the same manner as where the proceeding is by impeachment.

be tried otherwise than by a select number of Peers. The Chancellor pointed out various distinctions, which he stated to exist between the forms of proceeding in the court before which Lord Delamere was arraigned, and those observed at the trial of a Peer during a *session* of Parliament. The law in the latter instance was said to be governed by the precedents in the cases of Lord Pembroke and Lord Stafford, to the circumstances of which the attention of the reader has been already directed. And the trial of a Peer, at a time when Parliament is not sitting, was treated as being conformable to the precedents of the trials of Lord Morley and Lord Cornwallis in the preceding reign; cases, wherein the forms were adhered to, that are described in the more ancient records, which, it will be recollected, relate almost universally to trials before a select body of Peers. (a) . . .

Lord Chancellor Jefferies declared, that in the trials of Peers, which take place during the recess of Parliament, the High Steward is the Judge of the Court; that the Court is held before him, his warrant convenes the prisoner to the bar, his summons convenes the Peers for the trial; and he is to determine by his sole authority all questions of law, that arise in the course of the trial; but that he is to give no vote upon the issue of guilty or not guilty. During a session of Parliament, on the contrary, (he observed,) all the Peers are both triers and judges, and the High Steward is only as chairman of the Court, and gives his vote together with the other Lords.

These distinctions have been recognised by the

(a) Lord Morley's case, Kelyng, p. 57. Lord Cornwallis's case, Sir T. Jones, 54.

principal writers upon the subject of the judicial power of the High Steward, in the treatises that have been published since the period of Lord Delamere's trial; and, accordingly, Sir M. Foster and Sir W. Blackstone represent, that there are two separate tribunals for the trials of Peers, differing both in their constitution and in their jurisdiction, to which they give the distinguishing appellations of the Court of Parliament, and the Court of the High Steward. (*a*)

It may be proper here to notice some distinctions, of minor importance, between the form of trial in the High Steward's Court and that in Parliament. They relate chiefly to the power of adjournment (*b*), and to the publicity to be observed, when the Peers ask advice of the High Steward or of the Judges. (*c*) Again, some regulations appear to have a more peculiar reference to the Court of the High Steward; as, that the Peers cannot give a special verdict (*d*) — that they may eat and drink before delivering their verdict (*e*) — and that a writ of error upon the record may be brought in the King's Bench. (*f*)

(*a*) Bl. Com. vol. iv. p. 261. Foster, 141.

(*b*) Hawkins P. C. part II. p. 425. 3 Inst. 30. Kelyng, p. 56. Moore, p. 622. As to the High Steward taking time to advise, see Rushw. Hist. Coll. part I. vol. ii. p. 95.

(*c*) As to this distinction, see Commons' Journals' Report, 30th April, A.D. 1794, and Lords' Journals' Protest, June 29th, A.D. 1789. Hawkins, part II. p. 425. Kelyng, p. 54 and 57.

(*d*) Lord Audley's case, Hutton, p. 116.

(*e*) Lord Audley's case, Rushw. Hist. Coll. part II. p. 95.

(*f*) Per Whitelock, J. Hargr. St. Tr. vol. vii. p. 248. 1 Sid. p. 208. per Twisden, J.

Sir M. Foster states, as a peculiarity in the commission of the High Steward during the recess of Parliament, that he is thereby directed to summon the Peers Triers "*tot et tales per quos rei veritas melius sciri poterit.*" (a) There appears, also, to be another circumstance observable in the words of the commission, which he does not notice, that where the arraignment of a Peer happens while Parliament is not sitting, the Lords are required to be attendant upon the High Steward. This clause, requiring their attendance, is omitted as well in cases of impeachment, as where a Peer is tried upon an indictment in the House of Lords.

The reader will not fail to have remarked the modern date of the authorities, which have settled the distinctions observed in the trials of Peers; distinctions, which have given a different complexion and character to these proceedings: and he will have noticed, how much the diversity in the form of trial, where a Peer is arraigned upon an indictment in the High Steward's Court, or before the House of Lords, has been influenced by the analogies drawn from the case of impeachments.

With respect to the rank of the individual, qualified to hold the office of Lord High Steward, Sir W. Blackstone observes, that it has been the constant practice, (and therefore seems now to have become necessary,) to grant it to a Lord of Parliament. His opinion appears to have been expressed in this cautious manner, because Sir E. Coke, who relies upon a case in the Year Book of Henry VIII., in

(a) Lord Morley's case, Hargr. St. Tr. vol. vii. On the trial of the Countess of Somerset, the Peers were summoned by the Council; see Hargr. St. Tr. vol. i.

support of the necessity of the High Steward being a Lord of Parliament, is thought by Barrington to have been misled by the word "Seigneur," which occurs in that authority, and which term the learned antiquarian contends, has not a signification synonymous with that of Peer. (a)

With regard to the persons who are amenable to the jurisdiction of the High Steward's Court, it is said by Sir E. Coke, that a Queen Consort and a Queen Dowager may be tried before this tribunal. (b) And the collection of the State Trials contains several narratives, by different writers, of the merciless proceedings instituted against Anne Boleyn before the Duke of Norfolk (as High Steward) and a select number of Peers, at the Tower of London. It is satisfactory to find, in a passage of Burnet's History of the Reformation, the correction of a mistake, into which he had himself previously fallen, and which has been commonly adopted in the histories of this transaction, that the father of the Queen, the Earl of Wiltshire, was one of the Peers who condemned her. (c)

By a statute of the twentieth year of Henry VI., (which is remarkable for its being the only instance of a legislative explanation of any part of Magna Charta,) the trial of Peeresses is directed to be the same as that of Peers. The statute recites a doubt which existed respecting the interpretation of the Great

(a) Barrington's Observations on stat. 34th Edw. III., 3 Inst. p. 28. Staundforde, p. 152. Com. Dig. Officer, E. 5.

(b) 2 Inst. p. 50. Hawkins, part II. ch. 44.

(c) Burnet on the Reformation, part I. book iii. p. 368., and the Addenda, *ibid.* And see this topic adverted to, in the Conference upon the Treason Bill.

Charter, from which it would seem, that no precedent had occurred, during the space of more than two hundred years in the most barbarous period of our history; of a Peeress having been tried for a capital offence. (*a*)

As to the right of Bishops to be tried in the High Steward's Court, Selden says, that, out of Parliament, they are not to be tried by the Peers; but he thinks, that if the matter be moved against them in time of Parliament, they may. (*b*) In like manner, Serjeant Hawkins observes, that it seems agreed, when Parliament is sitting, a Bishop shall be tried by Peers. (*c*) Sir W. Blackstone assumes it as settled law, that a Bishop cannot be tried in the Court of the Lord High Steward (*d*): and the ancient writers upon Criminal Law are against the privilege of a Bishop being tried by the Peers in any case. (*e*) The precedents, however, of Bishops being tried by an ordinary jury, are very few in number (*f*); and the

(*a*) Barrington's Observations on the 20th Henry VI. Crompton's Jurisdiction of Courts, p. 33. b. 2 Inst. p. 50.

(*b*) Selden's Privileges of the Baronage, part II. ch. 2. Selden on the Judicature of Parliament, ch. 1.

(*c*) Hawkins, P. C. part II. ch. 44.

(*d*) Comm. lib. iv. ch. 19.

(*e*) Staundforde, lib. iii. p. 152. 3 Inst. 30. Crompton's Jurisdiction of Courts, p. 13.

(*f*) See them collected in Selden on Baronage, part II. ch. ii. 3 Inst. 30. Hawkins, P. C. part II. ch. 44. Staundforde, fol. 153. Bro. Ab. Trial, 142. Prynne's argument in the case of Lord Maguire, Hargr. St. Tr. vol. vii. And see the observations upon these authorities, in Stillingfleet's Ecclesiastical Cases, part II. p. 367.

reasons assigned, for their not being entitled to the same kind of trial as other Lords of Parliament, — because they hold their seats in the House of Lords “*ratione baroniarum*” and not “*ratione nobilitatis*,” and that their blood is not ennobled, — will not on examination be found satisfactory. The suspense of the right has been ascribed with greater probability to the circumstance, that the Bishops could never have demanded a trial in parliament without admitting themselves subject to a temporal jurisdiction, from which they formerly claimed a total exemption. (a) In the course of the controversy upon this subject, precedents have been alleged, in which even noblemen have declined the trial by their Peers, although it has been decided in later times, that they have no power of doing so (b) : and several examples have been adduced, of prosecutions of Bishops in Parliament for capital offences. (c) Moreover, it has

(a) Hunt’s argument for the Bishop’s right, ch. xvi. Christian’s Notes to Bl. Com. vol. i. p. 401. Woodeson’s Vinerian Lectures, vol. ii. p. 585. As to the claim of exemption from civil jurisdiction, see Articuli Cleri, ch. xv., 2 Inst. p. 633.

(b) Cases of Lord Berkeley, 4th Edward III., and of the Duke of Suffolk, 28th Henry VI. For the present law on this subject, see Lord Dacre’s case, 26th Henry VIII.; Lord Audley’s case, 7th Charles I.; Hawkins, P. C. part II. p. 425.

(c) Selden on the Judicature of Parliament, ch. i. Gibson’s Codex, Tit. V. ch. vi. Stillingfleet’s Ecclesiastical Cases, part II. p. 349. And see the observations on these precedents, in Lord Hollis’s Remains, p. 182.

been urged, in favour of the claim of the Bishops to be tried by their Peers, that in the twenty-eighth year of Henry VI., when the Duke of Suffolk waived this form of trial, and submitted himself to the King's mercy, the Lords *Spiritual* and Temporal united in making a protestation, (which was entered for greater solemnity in the Parliament Rolls,) that the precedent should not turn to the prejudice of themselves, their heirs, or successors, but that they might enjoy their liberties and freedoms *in case of their Peerage* hereafter, as freely as they or their ancestors enjoyed them.^(a) Although, therefore, the authorities undoubtedly preponderate against the right of the Bishops to be tried by their Peers, at least in the Court of the High Steward, yet they will, perhaps, not be considered as founded on very satisfactory reasons; and the judicial precedents, adduced against the enjoyment of the privilege, will probably not be deemed conclusive. ^(b)

(a) See observations on this protest, "Rights of the Bishops cleared," p. 14 and 126. Stillingfleet's *Ecclesiastical Cases*, part II. p. 354. Lord Hollis's Letter, p. 48.

(b) The reader, is referred, for other particulars respecting the trial of a Peer in the High Steward's Court, to the Tract, "*Summus Angliæ Seneschallus*," in Somers' Tracts, vol. viii. Woodeson's *Vinerian Lectures*, vol. ii. Hawkins' *P. C.* part II. ch. iv. *Vin. Abr.* tit. Peer. See also a collection of "Questions legal for the Judges, and questions of convenience for the King and Council, on the trial of the Earl and Countess of Somerset," Hargr. *St. Tr.* vol. i. For an instance of the Judges' declaring their opinions, on points of law, preparatory to a trial in

Some legislative enactments and determinations of the Lords, affecting the constitution and jurisdiction of the High Steward's Court, are next to be considered. By a statute passed in the fifteenth year of Edward III. it was ordained, that Peers should be tried by their Peers in Parliament; but it provides, that if any Peer should choose to be tried elsewhere than in Parliament, he might. This statute was repealed in the seventeenth year of the same King, because it was injurious to the prerogative. (a) Some attempts were made in the years A.D. 1668 and A.D. 1673, for the enacting of a law, by which the High Steward should be required to summon to his Court at least twenty or twenty-five Peers; but they failed in consequence of the jealousies entertained by the Commons. (b) There is a remarkable resolution contained in the Lords' Journals of the 14th January, A.D. 1689, and made a standing order of the House, "That it is the ancient right of the Peers of England to be tried only in full Parliament, for any capital offences." There is also another singular determination, of the date of the 18th Jan. A.D. 1691, "That it is the opinion of the House,

the High Steward's Court, see Lord Morley's case, *Kelyng*, p. 57. That the antient form, in which the Lords gave their judgment, was upon their *consciencs*, see Earl of Huntingdon's case, 1st Henry IV. For a minute detail of the ceremonial of the Court, see a tract by the Lancaster Herald, *Hargr. St. Tr.* vol. viii. App. n. 40.

(a) See the particulars of these transactions, in *Cotton's Abridgment of the Records*, p. 31 and 38.

(b) *Grey's Debates*, vol. i. p. 126. 189. vol. ii. p. 447, *et seq.*

upon search into precedents of all the commissions of High Stewards since the reign of Henry VIII., that, both by the King's commissions to the several Lords' High Stewards, and by the precepts of the Lords' High Stewards pursuant to those commissions, all the Peers of England were directed under the Great Seal, to be summoned to the trial of every Peer that was to be tried."

Whatever respect may be due to these opinions of the House of Lords, it cannot be contended, that it is in the power of a single branch of the legislature by any declarative resolution, to abolish the jurisdiction of the High Steward's Court, or to modify its constitution. The former determination would not merely alter the ancient constitution of the Court of the High Steward, in cases in which it is not affected by the statute of William III., (as, in the trial of Peers for felony, and for misprision thereof,) but would annul the jurisdiction of that Court, both in respect of treasons and felonies. Another effect of that determination would be, that a Peer, committed for either of these offences during a prorogation, must continue in prison, until the meeting of the ensuing Parliament; a consequence, which was deprecated in a protest by Lord Nottingham and other Lords. This resolution, therefore, cannot be considered as possessing any authority; particularly, as it militates with the uniform course of precedents of trials at a time when Parliament has not been sitting, and is opposed to the opinions of every legal writer who has treated upon the subject. (a)

(a) On the subject of this resolution, see Hatsell's Precedents, vol. iv. p. 299. n.

With respect to the latter determination, (as to the summoning of all the Peers,) the privilege, sought to be established by it, is, in cases of treason and misprision, effectually secured to the Peers by the statute of William III.; and if this determination had been thought to have settled the law upon the subject, it would have rendered the clause in that statute unnecessary. With reference, also, to cases of felony, since the act of William III., it does not appear consonant to legal authorities. Sir E. Coke mentions, that although no precise number of Peers is named in the precept of the High Steward, yet there must be twelve or more: in the Year Book of Henry VIII. it is said, eighteen or twenty ought to be summoned: Staunforde says twelve, or as many more as the King pleases. An uniform series of precedents, in different reigns, proves, that it has been usual to summon only a limited number of Peers; and, agreeably thereto, Lord Bacon in his "Declaration of the Treasons of Lord Essex," mentions, that twenty-five Peers were summoned for his trial, and that this was a greater number than had been called in any former precedent. Sir W. Blackstone, likewise, cites Kelyng, to show that the custom in modern times has been, to summon not less than twenty-three.—On a review of these authorities, it appears difficult to establish the proposition, that so ancient and so famous an usage has not qualified and restricted the import of the general expressions, contained in the commission of the Lord High Steward.

The constitution, therefore, and the jurisdiction of the Court, in which the Lord High Steward presides, appear, in cases not within the scope of the Treason Bill of William III., to remain the same as they were at the period of Lord Delamere's trial, which is the

Sir M. Foster is likewise of opinion, that the statute does not make it necessary to summon the Lords Spiritual to the High Steward's Court. These writers argue upon the ground, that no Bishop ever was or could be summoned to the Court of the High Steward, because no vote can there be given, excepting that of guilty or not guilty, (which, they assume, the Bishops are by the Canons forbid to give;) and although the statute of William regulates the proceedings of this Court, yet, they say, it never was intended to new-model or alter its constitution. In taking for granted the intention of the legislature, these writers appear to assume as incontrovertible, the very matter in dispute: and the reason which they assign, why Bishops could never have been summoned to the High Steward's Court, is founded on a determination of the House of Lords in a case of *Impeachment*, which is of no greater antiquity than the reign of Charles II. (a) Notwithstanding this precedent, the question, as to the right of Bishops to give a vote of guilty or not guilty in capital cases, is the subject of a controversy, very equivocal in its result. (b) The

nors of the Lords Spiritual asserted," p. 153. Stillingfleet's Eccl. Cases, part II. p. 346. Gibson's Codex, Tit. V. ch. 6. And see the protestation of the Bishops, 11th Richard II. *ibid.* The subject has engaged the attention of the House of Lords; Journals, Nov. 26th, A. D. 1661. Feb. 15th, A. D. 1662.

(a) Lords' Journals, 15th May, A. D. 1679. Hatsell's Precedents, vol. iv. p. 204. n., and see the cases of Lord Winton and Lord Lovat, p. 307. n. 314. n.

(b) The principal points, discussed in the course of this controversy, were, The antiquity of the Canon requiring

managers of the Lords and Commons, at their conference upon the subject of the Treason Bill, differed in opinion as to whether the terms of it would, by a reasonable construction, confer upon the Spiritual Lords a right to be summoned to the Court of the High Steward. Serjeant Hawkins and Barrington express a decided opinion, that the Bishops are comprehended within the words and the meaning of the

the clergy to abstain from judgments in cases of blood.—The construction to be put on the 11th Constitution of Clarendon, which refers to this Canon.—The effect of the protestation of the Bishops in the 11th year of Richard II.—The reversal of judgments on account of the absence of the Bishops.—Their appointing of proxies to vote for them in capital cases.—The practice which has been followed in Bills of Attainder.—The foundation of the right of Bishops to a seat in Parliament.—The consequences of disobedience to the canon according to the law of the Church, and the effect upon its authority by the Reformation.—The precedents adduced on both sides, and especially the import of particular words and phrases in those, which are brought forward to show that the Bishops have not been present at parliamentary transactions.—Besides the treatises already cited upon the subject of this controversy, the reader may consult “The Apology for the Bishops,” published A.D. 1660. A treatise to prove “That the Bishops are a fundamental and essential part of the English Parliament,” and another to prove “That they may be judges in capital cases,” both published A.D. 1680. Barrington’s *Observations on St. 27th Edward I.* Hargr. Co. Litt. 70. b. n. 2. Hale’s MSS. *De jure Coronæ*, ibid 134. b. n. 1. Warburton’s *Alliance*, p. 149. Report concerning Bishops voting on Impeachments respecting Capital Offences, Commons’ Journals, 26th May, A.D. 1679.

act. (a) On the trials of Lords Kilmarnock, Balmerino, and Cromartie, which, although they did not take place in the High Steward's Court, were conducted pursuant to the provisions of the statute of William, the Lords Spiritual were summoned, and on the day the trial came on, after making their usual protestation, they withdrew. (b) And in the subsequent trials of Lord Ferrers, Lord Byron, and the Duchess of Kingston, in parliament, upon indictments for felonies, the orders for the attendance of the Peers are expressed with evident reference to the statute of William, and on these occasions the Spiritual Lords were summoned, and did not withdraw till after the evidence had been concluded.

The mischief recited in the statute of William, to obviate which the 10th and 11th sections, for the more indifferent trial of Peers, were enacted, is, "That in the trial of a Peer or Peeress, the major vote is sufficient for condemnation or acquittal," whereas, saith the act, "in the trial of a Commoner, a jury of twelve freeholders must all agree in their verdict." But, as is observed by Sir M. Foster (c), the major

(a) Barrington on Magna Charta, ch. 37. Hawkins P. C. Part II. ch. 44.

(b) Lords' Journals, 28th July, A. D. 1746. See also, Journals, 17th April, A. D. 1760. 17th April, A. D. 1765. 15th April, A. D. 1776. And for the form of protestation, Hatsell's Precedents, vol. iv. p. 212. n. In the Lords' Journals, 22nd March, A. D. 1677. there is a protest made by Lord Shaftesbury alone, against an order that seats should be provided for the Bishops at a trial of a Peer. The Archbishop of Canterbury was appointed one of the Commissioners for the trial of the Queen of Scots. Howell's St. Tr. vol. ii. p. 1166.

(c) Sir M. Foster's Crown Law, Discourse I. ch. 3.

vote is still sufficient, and must be so, and in the Court of the Lord High Steward the majority must consist of twelve or more. And this eminent Judge states the real mischief, cautiously passed over, to have been, that on the trial of a Peer in the Court of the High Steward, the Peers were a select number, returned at the nomination of the High Steward, and the prisoner was in every case debarred the benefit of a challenge. (a) Burnet, in the History of his own Times, informs us, that the Treason Bill, which originated with the Tory party in the House of Commons, was passed after a long struggle, contrary to the hopes and expectations of the persons then at the head of affairs: and he relates, that the clause, for summoning all the Peers for the trial of a Peer, was introduced in the House of Lords as a device that the bill might be lost, but that, contrary to the wishes of the Court, the Commons were so desirous of passing the bill, that when it came down to them they agreed to the clause. (b)

The injustice of the ancient mode of trial has been severely felt on many occasions. At the trial of the Protector Somerset, three of his most inveterate enemies, and who had conspired his destruction, sat among his triers, Northumberland, Northampton, and Pembroke. (c) In a letter from Lord

(a) And see the arguments for and against the expediency of the clause urged by the Managers at the Conference. Hatsell, vol. iv. App. n. 3.

(b) Burnet's History of his own Times, last edition, vol. iv. pp. 247. 252. 284. and notes, *ibid.*

(c) Burnet's History of the Reformation, Part II. b. 1. p. 332.

Cornbury to the Duke of Ormonde, he writes that he had been informed, from a very credible quarter, that there was a design to prorogue the parliament on purpose to try his father, Lord Clarendon, by a jury of Peers, by which means he might fall into the hands of the Lords who were manifestly his enemies: and that this was the principal reason for his father withdrawing himself from the kingdom. (a) At the trial of Lord Delamere, among the Peers who were summoned by Jefferies, there were no less than six of the great officers of the Crown, besides several noblemen devoted at that time to the interests of the King. And, when it is considered that a trial in the High Steward's Court takes place before a Judge who is appointed after the prisoner is known — an anomaly in the judicial proceedings of this country — and when the mischiefs are contemplated of a partial selection of the Lords triers, uncontrolled by the privilege of challenging, (which is a necessary check in the trials of private individuals, where the panel is less obnoxious to suspicion,) it must be admitted that, antecedently to the statute of William, III., a Peer was never secure, in the Court of the Lord High Steward, of a fair and indifferent trial.

(a) Carte's Life of Ormonde, App. p. 39.

NOTE.

THE new act, for amending the laws relative to juries, had not passed, when the note (in p. 63. of this volume), on the right of challenging, was written.

All challenges, for defect of freehold, are now abolished. The 27th section of this statute (6 G. 4. c. 50.) has enacted, that if any man, returned as a juror for the trial of any such issue, (that is, any issue in any of the courts mentioned in the act) shall be qualified in other respects according to this act, the want of freehold shall not, on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the Crown or by the party, nor as cause for discharging the man upon his own application; any law, custom, or usage to the contrary notwithstanding.

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